Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT
OF THE UNITED STATES

SAMANTHA BATES
Petitioner,

v.

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael L. Donaldson (P35780)
Attorney for Petitioner
31564 Schoolcraft Rd.
Livonia, Michigan 48150
(734) 261-8140

ORAL ARGUMENT REQUESTED

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT, IN FAVOR OF RESPONDENT, ON THE GROUNDS THAT PETITIONER'S COMPLAINT WAS BARRED BY RES JUDICATA:

A. WHERE PETITIONER WAS NOT A PARTY TO THE PRIOR STATE LITIGATION, WAS NOT GIVEN NOTICE OF THE PRIOR STATE LITIGATION AND HAD NO RIGHT OF INTERVENTION.

B. WHERE THE STATE APPLICATION OF RES JUDICATA IS ADMITTEDLY AT THE "OUTER LIMITS" AND EXTREME.

C. WHERE, SINCE THE PRIOR STATE LITIGATION, THERE HAS BEEN SUBSTANTIAL CHANGE IN THE LAW.

D. WHERE THERE WAS NO "SUBSTANTIAL IDENTITY OF INTERESTS" AND NO "WORKING FUNCTIONAL RELATIONSHIP" BETWEEN PETITIONER AND THE DEFENDANT IN THE STATE LITIGATION AND

E. WHERE THE RELIEF SOUGHT BY PETITIONER WAS SUBSTANTIALLY DIFFERENT THAN SOUGHT BY THE DEFENDANT IN THE PRIOR STATE LITIGATION.

BEST AVAILABLE COPY

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Parties to the appeal in the Sixth Circuit Court of Appeals were:

Samantha Bates
Plaintiff/Appellant

Charter Township of Van Buren, A Michigan municipal corporation
Defendant/Appellee

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Rule 29(6), Samantha Bates makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? **NO**

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **NO**

Dated: 2/12/07

Michael L. Donaldson
Attorney for Petitioner

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The Order Denying Rehearing, dated November 13, 2006, was not reported and is reprinted in the Appendix at page 1a. The Judgment of August 21, 2006, affirming the District Court was not reported and is reprinted in the appendix at page 3a. The decision of the Sixth Circuit Court of Appeals, on August 21, 2006, was published, 459 Fed. 3d 731 (6th Cir. 2006), and is set forth in the Table of Authorities. The Order Granting Appellant an Expedited Hearing and Denying Remand, on December 15, 2006, was not reported and is reprinted in the Appendix at pages 4a-5a. The Order of the District Court Granting Appellee Summary Judgment and Dismissing Appellant's Case, dated July 25, 2005, was not reported and is reprinted in the Appendix at page 6a. The Order of the District Court modifying its Memorandum and Order of Dismissal to a Stay entered September 16, 2003, dated January 4, 2005 was not reported and is reprinted in the Appendix at page 7a. The Order of the Sixth Circuit Court of Appeals Affirming the Decision of the District Court, but modifying the Order of Dismissal to require a Stay of Proceedings, dated December 6, 2004, was not reported and is reprinted in the Appendix at pages 8a-18a.. The Order of the District Court dismissing Appellant's suit without prejudice on the grounds of abstention dated September 16, 2003, was not reported and is reprinted in the Appendix at page 19a-30a.

STATEMENT OF JURISDICTION

The Decision of the Sixth Circuit Court of Appeals affirming the District Court decision dismissing Appellant's 42 U.S.C. § 1983 First Amendment challenge of a township nudity ordinance was August 21, 2006 and rehearing denied November 13, 2006. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254, which permits review of a decision of the Sixth Circuit Court of Appeals by Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, RULES AND REGULATIONS INVOLVED

United States Constitution
- **First Amendment**
- **Fourth Amendment**
- **Fifth Amendment**
- **Fourteenth Amendment**

Federal Court Rules
- **Fed. R. Civ. P. 56(c)**

Federal Statutes
- **28 U.S.C. 2106**
- **42 U.S.C. 1983**

Michigan Court Rules
- **MCR 2.205**

Van Buren Township Ordinance
- **02-16-99(2)**

STATEMENT OF THE CASE

On March 2, 1999, Respondent, Van Buren Township, County of Wayne, State of Michigan, adopted Ordinance 2-16-99(2), entitled "Nudity on Licensed Premises". (App 31a-32a). The ordinance's intent was to proscribe public nudity in any facility licensed by the Michigan Liquor Control Commission within the Township. The ordinance provides, in pertinent part, as follows:

> (1) No person, while appearing in a state of nudity as defined in this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.
> (2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:
> (a) the whole or part of the pubic region;
> (b) the whole or part of the anus;
> (c) the whole or part of the buttocks;
> (d) the whole or part of the genitals;
> (e) the breast area including nipple, or more than one-half of the area of the breast. (App 31a)

There are no exceptions in the Ordinance for nudity in a public place such as a theater, stadium, health club, etc. Nudity is banned at all times in establishments licensed to sell alcohol.

On November 2, 2000, Respondent filed a Complaint in the State Circuit Court to enforce the Ordinance against The Garter Belt, Inc., a Michigan corporation, d/b/a Legg's Lounge.

(App 33a-38a) Respondent sought a Permanent Injunction precluding the Garter Belt from violating the Ordinance and a Declaratory Judgment. [hereinafter, **Garter Belt I**] **Petitioner was not a party, was not given notice of the litigation nor provided an opportunity to intervene.**(App 33a-38a)

The Garter Belt, Inc., on December 13, 2000, filed a Notice of Removal of the State Court litigation, File No. 2:00-cv-75395-GCS in the United States District Court for the Eastern District of Michigan. (App 39a-44a) On January 28, 2000, Garter Belt also filed a Complaint in the United States District Court challenging Respondent's Ordinance pursuant to 42 U.S.C. 1983, File No. 00-75630. (App 45a-90a).[**Garter Belt II**]. **Again, Petitioner was not named as a party, was not given notice and not provided an opportunity to intervene**. On January 18, 2001, Respondent raised the doctrine of abstention as an affirmative defense and on February 22, 2001, filed a motion for abstention. (App 100a). On January 19, 2001, the removal litigation, [**Garter Belt** I] was remanded to the State Circuit Court. (App 94a-96a).

On June 28, 2001, the District Court, in File No. 00-75630, [**Garter Belt II**] granted Respondent's abstention motion and dismissed the case without prejudice, stating:

> Younger abstention is appropriate here in that the state proceeding in Garter Belt I is currently pending, the enforcement of Township Ordinance 2-16-99(2) in Garter Belt I involves an important state interest, and Garter Belt I affords plaintiff Garter Belt an adequate opportunity to raise all of its claims, both state and federal. Abstention is also appropriate considering that resolution of the state issues in Garter Belt I may make federal constitutional rulings unnecessary.(App 100a)

On July 9, 2001, the Garter Belt, in Garter Belt II, filed a motion to alter, amend, reconsider or vacate which was denied July 31, 2001. On August 9, 2001, Garter Belt appealed to the

Sixth Circuit Court of Appeals from the June 28 and July 31, 2001 orders. On June 2, 2003, the Sixth Circuit, in an unpublished opinion, reprinted in the Appendix at pages (App 97a-106a), affirmed the decision of the district court, in Garter Belt II, to abstain and dismiss without prejudice.

Petitioner, Samantha Bates, at all times mentioned herein, was and is an independent contractor exotic performance artist [topless dancer] appearing at the Garter Belt, Inc. in Respondent Township. She had been, in 2000, a performance artist for more than 7 years. Her primary source of income came from her performance art.

About December, 2000, performance artists, including Petitioner, appearing at the Garter Belt, were informed that they would be required to wear pasties and a g-string when performing. However, Respondent's police officers informed Petitioner that pasties and a g-string were insufficient and that she would now be required to wear shorts similar to "Bermuda shorts" and wear a new form of pasty that covered one-half of the breast, [approximately the size of one-half the sole of a man's shoe].

On October 1, 2001, Respondent filed a Motion for Summary Disposition in the State Court action against the Garter Belt.[**Garter Belt I**] On December 11, 2001, the State Circuit Court entered an Order granting summary judgment and permanent injunction. (App 107a-109a) On December 20, 2001, the Garter Belt appealed the Order of the State Circuit Court upholding the constitutionality of Van Buren Ordinance 2-16-99(2).

On September 16, 2002, Petitioner filed her own 42 U.S.C. 1983, alleging violations of her First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution, against Respondent Township in the United States District Court for the Eastern District of Michigan, File No. 02-73692.(App 110a-129a) Respondent filed a Motion for More Definite Statement (App 130a-136a) and Petitioner filed her First Amended Complaint, alleging the same causes of action,

on November 8, 2002. (App 137a-151a). Township filed its Answer and Affirmative Defenses to Petitioner's Amended Complaint on November 27, 2002. (App 152a-162a). Thereafter, Township filed a Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(c). Petitioner filed a Motion for Partial Summary Judgment. (App 163a-199a).

Oral arguments were heard before the Honorable Avern Cohn, District Court Judge, on August 20, 2003. (App 200a-207a). On September 16, 2003, Judge Cohn entered an Order dismissing Petitioner's case without prejudice on the basis of Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). (App 19a-30a). Petitioner timely filed an appeal to the Sixth Circuit Court of Appeals from the Order of dismissal, Docket No. 03-2258. On December 6, 2004, the Sixth Circuit issued an unpublished opinion, which is reprinted in the appendix at page , affirming the decision of the district court, but modifying the dismissal order to require a stay of proceedings.

On September 25, 2003, the Michigan Court of Appeals issued an opinion affirming the State Circuit Court's grant of summary judgment and issuance of permanent injunction in Garter Belt I. Charter Township of Van Buren The Garter Belt Inc., 258 Mich App 594; 673 N.W.2d 111(2003) Garter Belt timely appealed to the Michigan Supreme Court. On June 24, 2004, the Michigan Supreme Court denied Application for Leave to Appeal (App 208a) and Garter Belt, on or about September 22, 2004, filed a Petition for Writ of Certiorari with this Court.

In accord with the decision of the Sixth Circuit, the district court, in this case, on January 4, 2005, modified its Order of September 16, 2003 from dismissal to stay. (App 19a-30a). When this Court, in Garter Belt I, denied certiorari, Petitioner's attorney filed a motion with the district court to Lift the Stay and Allow Supplemental Briefing. (App 209a-211a). This motion was granted with instructions that the parties address "the issue of the impact of the state court's decision on

Bates' claim and whether any doctrine(s) bar(s) Bates from litigating her claims in this form." (App 212a-218a)

On July 25, 2005, the district court entered a Memorandum and Order denying Petitioner's Motion for Partial Summary Judgment and granting Respondent's Motion for Summary Judgment, disposing of all claims and dismissing Petitioner's case with prejudice. (App 6a). The district court determined that res judicata barred Petitioner from litigating her federal claims, relying on Adair v. State of Michigan, 470 Mich 105, 120 (2004). Bates timely appealed. After filing her appeal with the Sixth Circuit, the Sixth Circuit decided Odle v. Decatur County, Tennessee, 421 F. 3d 386 (6th Cir. 2005) and Petitioner moved the Sixth Circuit for remand or in the alternative, expedited appeal. (App 219a-231a). The Sixth Circuit denied remand but ordered expedited appeal. (App 4a-5a).

On August 21, 2006, the Sixth Circuit Court of Appeals, in a 2-1 decision, affirmed the district court's dismissal on the grounds of res judicata. 459 Fed 3d 731 (6th Cir. 2006) The Court did not address the merits of Petitioner's complaint. Petitioner timely petitioned for rehearing and on November 13, 2006, the petition was denied, although Judge Gilman would have granted rehearing. (App 1a).

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The most fundamental of all rights ensured by our Constitution, by the First and Fourteenth Amendments, are the rights to:(1)petition the courts for the redress of grievances;(2).to have his or her day in court and (3) to be heard. By extreme application of claim preclusion, res judicata, Petitioner has been deprived of these rights. She has been prevented from presenting her federal grievances in federal court, because of a state court of appeals decision, in a case where she was not a party, not given notice and could not intervene of right. Petitioner contends that the state court

decision, which allegedly precludes her right to be heard, is unconstitutional, and in conflict with the decisions of the this Court and the twelve federal circuits, particularly the Sixth Circuit.

The decision of the Sixth Circuit, in this case, affirming the district court grant of summary judgment on the ground of claim preclusion, as more fully set forth hereinafter, misapplies the claim preclusion doctrine, is in direct conflict with Michigan law, as pertains to the requirements of "identity of interest" and "working functional relationship" to apply claim preclusion and in conflict with decisions of this Court. Further, as explained hereinafter, the Sixth Circuit's decision is "manifestly unjust".

This Court, in Migra v. Warren City Sch. Dist. Bd. Of Educ. 465. U.S. 75. 77 (1984) N1, instructed that:

> The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect also is referred to a direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have ben advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar.

The Sixth Circuit, in this case, has not followed Migra, has violated its own case authority, and conflicts with the decisions in other circuits, i.e. CSX Transp. Inc. v. Bhd. Of Maint. Of Way Employees, 327 F. 3d 1309, 1317 (11th Cir. 2003).

Not a Necessary Party in Garter Belt I

In Garter Belt I and II, Petitioner was not a party, was not notified of either action, had no opportunity to appear and defend, and was not a necessary party as that term is defined by Michigan Court Rule MCR 2.205 (App 232a-233a). If the Ordinance litigation, initiated by Respondent,(Garter Belt I) was intended to effect Petitioner's ability to artistically perform, she would have been a person "having such interest in the subject matter of an action that their [her] presence in the action is [was] essential to permit the court to render complete relief must be made parties...".MCR 2.205(App 232a-233a) If the state circuit court, Respondent or Garter belt considered Petitioner a necessary party in Garter Belt I, she would have been entitled, at minimum, to notice. The state circuit court would have had to consider" the prejudice...to the person not joined that may result from the non joinder." (App 232a) She was not made a party, not notified and there is no record that the court, Respondent or Garter Belt ever mentioned her or considered the "prejudice ..that might result from non joinder." **If Petitioner was not considered a necessary party by the state circuit court she would not have sufficient "identity of interest" for claim preclusion to apply.** **Not Same Legal Principles**

> In Adair, supra, the Michigan Supreme Court stated:
> The doctrine of res judicata is employed to prevent multiple suits, litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been resolved in the first. Sewell v. Clean Cut Mgt. Inc., 463 Mich 569, 575; 621 NW 2d 222 (2001). This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties.

exercising reasonable diligence, could have raised but did not. Dart v. Dart, 460 Mich 573, 586; 597 NW 2d 82 (1999).

The trial court decision in Garter Belt I granting Respondent summary judgment and ordering a permanent injunction (App 107a-109-a) was rendered December 11, 2001.Petitioner filed her Complaint on September 16, 2002, 9 months after the state circuit court had rendered its decision in Garter Belt I. Her claim was not dismissed by the district court for claim preclusion until July 25, 2005. Between December 11, 2001 and the Order dismissing Petitioner's complaint for claim preclusion, there had been an abundance of law decided by the various circuits. See Dream Palace v. County of Maricopa, 384 F. 3d 990 (9th Cir. 2004), R.V.S. LLC v. City of Rockford, 361 F. 3d 402 (7th Cir. 2004); Ways v. City of Lincoln, 274 F. 3d 514 (8th Cir. 2001). In addition, the Sixth Circuit had also decided Deja Vu of Nashville, Inc. v. Metro Gov. of Nashville, 421 F. 3d 417 (6th Cir. 2005). While Petitioner's claim was pending appeal, the Sixth Circuit decided Odle, supra, the Third Circuit decided Conchatta Inc. v. Miller, 458 F. 3d 258 (3d Cir. 2006) and the Fourth Circuit decided Giovanni Carandola, LTD v. Fox, 470 F. 3d 1074 (4th Cir. 2006). Petitioner would suggest that her Complaint for relief, pursuant to 42 U.S.C. 1983, **was not based on the same legal issues as decided by the Michigan Court of Appeals in Garter Belt I.**

Claim preclusion, as applied in this case, would have barred Brown v. Bd. of Ed. 347 U.S 483 (1954) because of the holding in Plessy v. Ferguson, 163 U.S. 537 (1896) In Garter Belt I, the Michigan Court of Appeals held that it was bound by Jott, Inc. v. Charter Township of Clinton, 224 Mich App 513 (1997), 258 Mich App at 604. Jott rejected the idea that City of Erie v. Pap's A.M. 529 U.S. 277 (2000) and 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) overruled California v. LaRue, 409 U.S. 109 (1972). Jott utilized a rational basis level of scrutiny instead of the intermediate scrutiny as clearly set forth in U.S. v. O'Brien, 391 U.S. 367 (1968) and City of Los

Angeles v. Alameda Books, Inc. 535 U.S. 425 (2002). There were to many changes in the law between Jott in 1997 and the Sixth Circuit's decision in 2006 to consider Petitioner's case "substantially identical" to Garter Belt I. When the Sixth Circuit rendered its decision in this case, Garter Belt I was the equivalent of Plessy, supra., and not applicable to a decision on the merits as it related the adoption of Respondent's ordinance in 1999.

In Baraga County v. State Tax Commission, 243 Mich App 452; 622 NW 2d 109 (2001), reaffirmed in Adair, the Court of Appeals stated:

> We acknowledge, however, that res judicata does not bar litigation where a subsequent change in the law alters the legal principles on which the subsequent case is to be resolved. Pike v. Wyoming, 431 Mich 589, 596-597, 608; 433 NW 2d 768 (1988). Socialist Workers Party v. Secretary of State, 412 Mich, 571, 586-587; 317 NW 2d 1 (1932); 1 Restatement Judgments, 2d § 26, comment e, p 239.

This holding of Baraga, reaffirmed by Adair, was not addressed by the district court or the Sixth Circuit Court of Appeals. Neither the district court nor the Sixth Circuit looked to the changes in the law since the ordinance was adopted and since Garter Belt I was decided before invoking claim preclusion.

Retroactive Application of New Law

Further, several of the cases decided after Garter Belt I, but while Petitioner's action was active, were given retroactive application. In Deja Vu of Nashville, supra, the Sixth Circuit held that new decisions and specifically Odle, supra, "must be given full retroactive effect in all cases still open on direct review and as to all events regardless of whether such events predate or postdate our announcement of the rule." In applying claim preclusion to the instant case, the district court and the Sixth Circuit Court of Appeals disregarded the holding of Deja Vu of Nashville and did not provide "full retroactive effect". If

either the Sixth Circuit or the district court had provided "full retroactive effect", claim preclusion would not lie because the applicable case law post dated Garter Belt I.

In Baraga, supra, the Michigan Court of Appeals held that "res judicata does not bar litigation where a subsequent change in the law alters the legal principles upon which the subsequent case is to be resolved." Odle, supra, did not exist when Garter Belt I was decided. In his dissent, Judge Gilman wrote:

> I do not believe that all subsequent plaintiffs who might wish to challenge the Township's nudity ordinance should be precluded on the basis of res judicata from seeking a federal ruling on whether the ordinance violates the First Amendment. The majority's holding is especially unsatisfying in this case because this circuit has recently held that a similar Tennessee nudity ban was unconstitutionally overbroad. See Odle v. Decatur County, Tennessee, 421 F. 3d 386 (6th Cir. 2005) (overturning an ordinance that "prohibits, among other things, nudity and the performance of a wide range of arguably sexually suggestive acts in 'public places where intoxicating liquors are offered for sale, served or consumed.'"). 459 F. 3d at 738.

The majority of the Sixth Circuit panel, in an effort to apply Adair, chose to overlook the holding in Baraga, although Baraga is cited with favor in Adair. The majority further ignored its own holding in Deja Vu of Nashville, which gave retroactive application to Odle.

Adair involved a case where a group of teachers brought suit raising certain tax related issues called the Headlee Amendment. Later, another group of teachers raised the same claim. The facts of Adair were unique as Judge Gilman recognized in his dissent. The Supreme Court, in Adair, 470 Mich at 112, recognized that the case was unique when it stated:

"We must then consider res judicata and apply it to this unique Headlee situation."

No Privity for Lack of "Substantial Identity of Interest" and Lack of "Working Functional Relationship"

> In Adair, supra, the Michigan Supreme Court stated:
> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. Baraga Co. v. State Tax Comm., 466 Mich 264, 269-270; 645 NW 2d 13 (2002). The outer limit of the doctrine traditionally requires both a Plessy v. Ferguson, 163 U.S. 537 (1896) and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation. Id., quoting Baraga Co. V. State Tax Comm., 243 Mich App 452, 456; 622 NW 2d 109 (2000), citing Phinisee v. Rogers, 229 Mich App 547, 553-554; 582 NW 2d 852 (1998).

Adair requires Respondent to prove a "working functional relationship" between Petitioner and Garter Belt and requires Respondent to prove "substantial identity of interests" with Garter Belt and Respondent proved neither. Respondent merely stated that because Petitioner was a topless dancer at the Garter Belt, they "were two sides of the same coin". This may be a clever statement, but it is dead wrong.

The Garter Belt is a bar. It is licensed by the State of Michigan to sell alcoholic beverages. Its primary interest is selling alcoholic beverages. In that endeavor, it permits expressive dancer performers, such as Petitioner, to perform. Its interest is sale of alcoholic beverages and income.

Petitioner is an expressive, interpretive dancer. Her primary interest is dance. Her income comes not from the sale of alcoholic beverages, but from the loyalty of the patrons of her art. Her income comes from tips. An expressive dancer's primary interest is the dance, the primary interest of the Garter

Belt is the sale of alcoholic beverages. An expressive dancer is not limited to performing her art at places that sell alcoholic beverages. The Garter Belt, as a liquor licensee, only exists to sell alcoholic beverages. There is a distinct difference between these two interests.

In ANR Pipeline Co. v. Dept of Treasury, 266 Mich App 190, 214; 699 NW 2d 707 (2005), the Michigan Court of Appeals found claim preclusion did not lie, stating that the Public Service Commission and the Department of Treasury, "do not share identical interests as did school-district plaintiffs in Adair. Thus, Petitioner's statement that privity exists is problematic even under Adair." Not only must there be a "substantial identity of interest to establish privity, Adair requires that the second litigant's interest, Petitioner's interests, were actually presented in the first action. Adair, 470 Mich at 121, stated that the identity of interests must be "adequately presented and protected by the first litigant."

Adair is based on Sloan v. Madison Heights, 425 Mich 288; 389 NW 2d 418 (1986). In Sloan, the Michigan Supreme Court, at 425 Mich 296-297 stated:

> In the first litigation, Gerald Sloan, an officer in a rank one step lower than the assistant chief's position, alleged that the city was required to promote him to the higher position pursuant to 1935 P.A. 78 which had been adopted by the City of Madison Heights in its charter. Neither party has presented to this Court any evidence that Sloan was *bringing a cause of action in 1979 as a member of the FOP or that he raised any contractual claims at that time. Although it may be that Sloan's rights under the FOP contract should have been raised in the first suit, it is clear that the union's interest, i.e., the collective bargaining agreement, was not at issue. Therefore, the FOP in the 1979 case did not have a mutual or successive relationship to the same*

rights of property as Gerald Sloan. Plaintiff in the first case was pursuing his rights under the city charter and 1935 P.A. 78 and not as a member of the union. We find, therefore, that the FOP, plaintiff-intervenors in the instant suit, were not privies to Gerald Sloan in the 1979 case and are not precluded under the doctrine of res judicata from bringing this cause of action". (Emphasis supplied).

The "adequate representation" rule envisioned by both Adair and Sloan requires both the existence of a representative relationship and the actual presentation of the issues of the privy in the prior litigation.

As set forth above, if there "substantial identity of interests" Petitioner would have been a necessary party under MCR 2.205. She was not have been considered to be a necessary party by Respondent or it would have, at least, given Petitioner notice of the litigation. Further, neither Respondent, the district Court, nor the Sixth Circuit could find evidence of a "working functional relationship" between Petitioner and Garter Belt. The majority of the Sixth Circuit panel, as noted by Judge Gilman in his dissent,"eviscerates the 'working functional relationship' portion of Adair's preclusion test". 459 F.3d at 739 Judge Gilman further noted that the majority "denigrates the 'working functional relationship' prong of Adair by commenting that" it is hard to see what force the requirement retains.'" 459 F3d at 738.

The majority could not see "what force the requirement" had, because to do so would have required the majority to realize the uniqueness of the Adair decision. Adair involved two groups of teachers from different school districts. Both lawsuits involved challenges to a taxing amendment to the Michigan Constitution, commonly known as the Headlee Amendment. Although from different school districts. The Michigan Supreme Court noted that the two lawsuits by the two groups of teachers involved the same issues with no changes in the law between

the two actions. The Supreme court noted that in Michigan the teachers were seeking to establish state funding for their school district and to ensure that mandated programs were funded. The school districts sought a ruling on whether to State of Michigan was complying with the Michigan Constitution. **They were "working functionally " together to ensure funding for all.**

The majority could not find the second prong of Adair so they elected to ignore it. How does one apply a test by changing the test? If the Majority could not find the existence of the second prong they should have joined the dissent and overruled the district court

In Dearborn Heights School Dist. No. 7 v. Wayne County MEA/NEA, 233 Mich App 120, 126-127; 592 NW 2d 408 (1999), in addressing the concept of "substantial identity" sufficient to trigger preclusion, the Michigan Court of Appeals observed:

> The purpose of the substantial-identity rule is to ensure that collateral estoppel is applied only where *the interests of the litigating party are adequately represented in the first proceeding.* See Nummer v. Dept' of Treasury, 448 Mich 534, 542-543, 533 NW 2d 250 (1995). Thus, a nonparty to an earlier proceeding will be bound by the result *if that party controlled the earlier proceeding or if the party's interests were adequately represented in the original matter.* Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 43 F. 3d 1054, 1069-1070 (C.A. 6 1995)...Although the union may have an institutional interest of its own in enforcing the contractual requirement of just cause for discipline, *Adis' interests were adequately represented before the commission, having had every incentive and opportunity to litigate her personal interest in the tenure proceeding fully and aggressively. Further, it is clear that the*

> *union was simply acting in a representative capacity for Adis in the arbitration proceedings.* Thus, there was substantial identity between the parties for purposes of invoking collateral estoppel to bring the commission's conclusion that Adis committed assault and battery to bear on any subsequent proceedings. (Emphasis supplied).

Thus, the Court of Appeals' conclusion that the teacher was in privity with the union turned upon the fact that she had both the opportunity and the incentive to litigate her interests, and that her privy was acting in a representative capacity in the former lawsuit. Dearborn Heights School Dist. No. 7, 233 Mich App at 126-127. Bates can certainly not be found in privity with the Garter Belt on those bases, since she neither had an opportunity nor the incentive to litigate her interests in Garter Belt I, the Garter Belt certainly was not acting in a representative capacity in Garter Belt I, and the Township offered no such evidence.

Adair, Sloan and Dearborn Heights School Dist. No. 7 thus establish that for "adequate representation" (i.e., for representation sufficient to result in a finding of privity and thus preclusion) to exist, the Michigan courts require that the interests of the non-party be actually presented in the prior action. Certainly, that was exactly the case in Adair, 470 Mich at 122-123, in Sloan, and in Dearborn Heights School Dist. No. 7. Similarly, that was the case in Phinisee, supra, where the Michigan Court of Appeals held:

> Privity between a party and a non-party requires both a 'substantial identity of interest' and a 'working or functional relationship'...in which the interests of the non-party *are presented* and protected by the party in the litigation. (Emphasis supplied)

We ask that this Court take particular note that Dearborn Heights School Dist. No. 7 both cited to and relied upon Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 43 F. 3d 1054, 1069-1070 (6th Cir. 1995), where the Sixth Circuit strictly limited

the scope of the "adequate representation" doctrine. The Adair version of claim preclusion based upon "adequate representation" is pragmatically indistinguishable from claim preclusion based upon "virtual representation", as discussed by the Sixth Circuit in Becherer, supra.

In Becherer, the Sixth Circuit noted that the doctrine of virtual representation (under which nonparties to an earlier action can be bound by the result because their interests were represented adequately by a party to the original suit) demands the existence of an express or implied legal relationship in which the parties to first suit are accountable to the nonparties who file subsequent suits raising identical issues, held that the district court had used an impermissibly broad definition of adequate (i.e., virtual) representation to find that a group of Michigan investors in a Florida resort hotel and a second group of Florida investors were in privity on the basis of virtual representation, so that the decision in the federal district court case in Michigan was binding on the Florida group. In reversing, the Sixth Circuit observed:

> The doctrine of adequate representation is also known as virtual representation. This concept has been developed primarily by the Fifth Circuit...In the words of the Fifth Circuit, the doctrine of virtual representation "...requires more than a showing of parallel interest or, even, a use of the same attorney in both suits...The question of virtual representation is one of fact and is to be kept within 'strict confines'...'Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to non-parties who file a subsequent suit raising identical issues'. Benson and Ford, Inc. v. Wanda Petroleum Co., 833 F. 2d 1172, 1175 (5th Cir. 1987) (citations omitted). A leading treatise also agrees with the need to keep the doctrine within

strict confines:

> Some decisions and commentaries have begun to develop a theory of nonparty preclusion that is often identified as "virtual representation." The broadest form of this theory would preclude relitigation of any issue that had once been adequately tried by a person sharing a substantial identity of interest with a nonparty. Justification for this result is found in the general theory of representation. Adoption of the theory in this form could expand nonparty preclusion far beyond current practice. If one of fifty persons injured in a bus accident should lose an action against the bus company, for example, all of the other passengers could be bound by any adverse findings. Actual use of virtual representation theory has not yet begun to approach such expansive consequences, and it does not seem either desirable or likely that it will carry so far. 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4457 (1981).

In Howell v. Vito's Trucking & Excavating Co., 386 Mich 37, 43; 191 NW 2d 313 (1971), the Michigan Supreme Court interpreted privy as "one who, after rendition of the judgment has acquired an interest in the subject matter affected by the judgment through or under one of the parties as by inheritance, succession or purchase." In Sloan, supra, cited by Adair, the court stated:

> In its broadest sense, privity has been defined as "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right" Petersen v. Fee Int'l, Ltd. 435 F. Supp. 938, 942 (WD Okla, 1975).

Petitioner and the Garter Belt have no "mutual or successive relationship to the same right of property." Artistic expression is

personal to the artist and the Garter Belt does not perform expressive dance. There is no "functional relationship" between Petitioner and the Garter Belt. They are not, as Respondent suggested below "two sides of the same coin." Their situation is more analogous to a movie theater. The theater displays the art of others. The movie theater rents the film, but does not own the film nor the art performed therein. In the instant case, the Garter Belt does not rent the expressive dancer, but rather allows the dancer to rent space at the Garter Belt. The dancer chooses her art form, her music and her expression. The Garter Belt is the gallery where the art is displayed, it is neither the artist nor the art itself.

The Sixth Circuit Court of Appeals, in its decision in this case, noted that Adair "did not explain how the parties maintained 'working functional relationship', the second component for the test for privity and thus it is hard to see what force the requirement contains."

Refusal to Apply Richards v Jefferson County and Lack of Due Process

In its decision affirming the district court's dismissal with prejudice based on claim preclusion, the majority in the instant case wrote:

> As a final point, we note that Bates has not challenged Michigan's res judicata doctrine as unconstitutional under Richards v. Jefferson County, 517 U.S. 793 (1996). In Richards, the Court held that a state court's "extreme" application of state res judicata principles to bar a "stranger" to a previous judgment from pursuing her constitutional claims deprived that party of Fourteenth Amendment due process. 517 U.S. at 797, 802. Richards did not concern a series of facial challenges, so it is quite possibly distinguishable from this case. Either way, the issue is not properly before the court, as Bates has not raised the argument.

In the instant case, Petitioner advised the district court and the

Sixth Circuit that she was not a party to the Garter Belt litigation, received no notice of that litigation and had no right to intervene. In Richards, supra, this Court wrote:

> Because petitioners received neither notice of, nor sufficient representation in, the Bedingfield litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property. Accordingly, the judgment of the Alabama Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Petitioner argued in the district court and in the Court of Appeals, that she not only did not get notice, but there was no "substantial similarity of interest" between Petitioner and the Garter Belt and argued repeatedly that her interests were not adequately represented in the original matter, citing Becherer, supra, 43 Fed. 3d at 1069-1070. The majority of the panel in the Sixth Circuit, in this case, decided that form over substance should prevail.

It is true that Petitioner did not mention Richards, but cited the same facts as applied in Richards and the majority of the Sixth Circuit panel elected not to apply the due process issue from Richards because Petitioner failed to cite Richards. Perhaps the majority did not read Justice Stevens and Justice Kennedy's dissent Unitherm Food Sys., Inc v Swift-Eckrich, Inc., 546 U.S. 394, 407 (2006) where Justice Stevens wrote:

> Murphy's law applies to trial lawyers as well as pilots. Even an expert will occasionally blunder. For that reason Congress has preserved the federal appeals court's power to correct plain error, even though trial counsel's omission will ordinarily give rise to a binding waiver...The spirit of the Federal Rules of civil Procedure favors preservation of a court's power to avoid manifestly unjust

results in exceptional cases.

28 U.S.C. § 2106 accorded the district court and majority the opportunity to apply Richards and both ignored the statute,. Petitioner would submit, because she is a performance artist .

In Richards, this Court held that without due process, res judicata does not apply. The majority of the panel in the Sixth Circuit held that because Petitioner did not cite Richards or use the term "due process", although citing the facts sufficient to set forth the lack of due process, res judicata would apply. This makes a mockery of the Richards decision.

However, Richards goes further than merely denying due process because of lack of notice and insufficient representation. This Court in Richards stated, citing Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 475 (1918), that: "extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'" This Court continued, in Richards, 517 U.S. 797-798 to state:

> The limits on a state court's power to develop estoppel rules reflect the general consensus "in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. Hansberry v. Lee, 311 U.S. 32, 40 (1940)...This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller, & e. Cooper, Federal Practice and Procedure § 4449, p 417 (1981). Martin v. Wilks, 490 U.S. 755, 761-762 (1989). As a consequence, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." Id. at 762; Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 329 (1971).

Petitioner, throughout her argument, argued that the

district court and the Sixth Circuit Court of Appeals were utilizing an "extreme application of state-law res judicata principles" to dismiss her claim and deny her, her day in court. In the dissent, Judge Gilman disagreed with the majority's interpretation of Adair and noted that the majority opinion "glosses over a key portion of Adair's reasoning." Judge Gilman further noted that the Michigan Supreme Court itself recognized that Adair represented "the outer limits of the doctrine" of res judicata and Judge Gilman would "avoid increasing the already broad scope of Adair...."

There is a terrible cliche that is applicable here, but is offered with apologies. The saying goes: "if it looks like a duck, walks like a duck and quacks like a duck, it is a duck". In this case, Petitioner argued all of the elements of Richards, both as to "due process" and "extreme application state law res judicata principles". Because Petitioner didn't say "due process" or cite Richards by name, the majority of the Sixth Circuit held that the holding in Richards was inapplicable.

In Rio Grand Irrigation & C. Co. v Guildersleeve, 174 U.S. 603, (1898), this Court held:

> A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case...The courts may rescind or repeal their rules without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases.

By ignoring 28 U.S.C. § 2106 the majority of the panel violated this holding.

The essence of due process is fair play..Galvan v Press 347U.S. 522 (1954) In Matthews v. Eldridge, 424 U.S. 319 (1976), this Court held that due process is not a technical concept with fixed content unrelated to time, place and circumstances, but is flexible and calls for such procedural protections as a particular situation demands. This Court has repeatedly equated due

process with fundamental fairness and the lack of "arbitrary impositions and purposeless restraints." Poe v. Ullman, 367 U.S. 497, 453 (1961) dissenting opinion.

The majority of the panel recognized from Petitioners briefs and argument that "extreme application", as set forth in Richards, was being argued. They recognized, from the argument and briefs, that Petitioner had been denied "due process" by lack of notice and opportunity to participate in Garter Belt I. The majority also knew that Petitioner's complaint involved serious First Amendment issues. They knew that their decision would be manifestly unjust to Petitioner. They knew all these things but affirmed.

Relief Sought by Petitioner Differed From Relief Sought in Garter Belt

Judge Gilman, in his dissent, noted that Petitioner and Garter Belt "did not seek the identical legal relief." 459 F. 3d at 739. Judge Gilman wrote:

> The Garter Belt invoked the First Amendment as a defense in order to prevent the Township from requiring The Garter Belt to comply with its nudity ordinance. Charter Twp. of Van Buren v. Garter Belt, Inc., 258 Mich App 594, 597, 673 NW 2d 111 (Mich App 2003). Bates, in contrast, seeks not only a declaration that the Township's nudity ban is unconstitutional, but also $50,000 in compensatory damages. The majority argues that Bates's damages claim does not render this case distinguishable from Adair because "[t]he only basis [Bates] alleges for such damages is the ordinance's facial unconstitutionality." Maj. Op. At p. 5 (emphasis in original). This proves too much, however, because individual damages always flow from the violation of the legal right at issue.
>
> I believe that the decision in Adair stemmed from the fact that a declaratory judgment was the only

> relief sought by the various school districts , 680 NW 2d at 397. A party seeking damages, however, has a qualitatively different interest than a party seeking only declaratory relief. Phinisee v. Rogers, 229 Mich App 547. 582 NW 2d 852, 855 (Mich Ct App 1998).

The district court judge asked the parties to address the issue of whether Petitioner's claim was barred. The district court was looking for a reason to dismiss Petitioner's case. Respondent attempted to argue the Rooker-Feldman doctrine, which was inapplicable, but the district court judge seized on Adair. Both the district court judge and the majority of the Sixth Circuit panel made the same error. They attempted to take Adair out of context. They applied only Adair and not the remainder of Michigan law that explained, modified or set forth exceptions to Adair. The district court judge and the majority took that portion of Michigan law that they believed would support claim preclusion and ignored that portion of Michigan law and Sixth Circuit law that would deny claim preclusion. Such procedure is, in itself, a denial of due process.

CONCLUSION

The facts and the law favor this Petitioner, her craft does not. It has been more than a decade since this Court's decision in Richards. Except for Justice Stevens' dissent, it has been more than a decade since this Court addressed the application of 28 U.S.C. 2106. The 2-judge majority of the Sixth Circuit panel that reviewed Petitioner's appeal ignored this Court's holding in Richards that instructed against the application of res judicata where state courts had used extreme applications of claim preclusion to deny an individual, such as Petitioner, her day in court, her opportunity to present her federal claims. The majority of the Sixth Circuit panel disregarded its own authority in order to apply claim preclusion in this case and when the majority of the panel could not apply both prongs of the Adair test for res judicata, the majority merely ignored or denigrated the second prong. Petitioner prays that the Writ of Certiorari be granted.

Dated: 2/12/07

Respectfully Submitted.

Michael L. Donaldson (P35780)
Attorney for Petitioner

No. 05-2137
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMANTHA BATES,)
Plaintiff-Appellant,)
)
v.)
)
TOWNSHIP OF VAN BUREN,) ORDER
Defendant-Appellee.)

FILED

BEFORE: Gilman and Cook, Circuit Court Judges; and DOWD, *District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Gilman would grant rehearing for he reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Leonard Green, Clerk

*Hon. David D. Dowd, Jr. Senior United States District Judge for the Northern District of Ohio, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 052-2137

FILED
AUG 21, 2006
LEONARD GREEN, Clerk

SAMANTHA BATES,
Plaintiff- Appellant,

v.

TOWNSHIP OF VAN BUREN,
Defendant - Appellee.

Before: GILMAN and COOK, Circuit Judges; DOWD, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

No. 05-2137
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMANTHA BATES,)
)
Plaintiff-Appellant,)
)
v.)
)
TOWNSHIP OF VAN BUREN,)
)
Defendant-Appellee.)

FILED
NOV 18 2005
LEONARD GREEN, Clerk

Before: MERRITT, MOORE, and SUTTON, Circuit Judges.

The plaintiff appeals summary judgment for the defendant in this challenge to an ordinance that bans nudity where liquor is sold. She moves to remand to the district court for consideration of decisions issued by this court after she had filed her notice of appeal. In the alternative, the plaintiff moves to expedite the appeal. The defendant has not responded to the motion.

The district court granted summary judgment on grounds of res judicata and the decision of the Michigan Court of Appeals in a related case, Van Buren Township v. Garter Belt, Inc., 673 NW.2d 111 (Mich. App. Ct. 2003), cert denied, 125 S. Ct. 620 (2004). Within the motion now before the court, the plaintiff seeks a remand to the district court for hearing on the application of Odle v. Decatur County, Tennessee, 421 F.3d 386 (6th Cir. 2005). Upon consideration, we conclude this argument should be presented as part of the merits of this appeal.

Therefore, the motion to remand is **DENIED.** The clerk shall enter an abbreviated briefing schedule in this appeal. Upon the completion of briefing, the case shall be submitted as soon as the regular calendaring process permits.

ENTERED BY ORDER OF THE COURT

Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMANTHA BATES, Case No.02-73692
Plaintiff (s), HONORABLE AVERN COHN

v.

TOWNSHIP OF VAN BUREN,
Defendant(s).
_____/

JUDGMENT

For the reason s stated in the Court's Memorandum and Order entered and filed on this date, the Defendant's Motion for Summary Judgment is GRANTED and the Plaintiff's Cross Motion for Summary Judgment is DENIED. Judgment is entered in favor of the Defendant and the case is DISMISSED.

DAVID WEAVER

Dated: July 25, 2005 By: s/Julie Ownes
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMANTHA BATES, Case No.02-73692

Plaintiff,

v.

TOWNSHIP OF VAN BUREN,

Defendant.

FILED

ORDER

Pursuant to the Mandate issued by the United States Court of Appeals for the Sixth Circuit on December 28, 2004, the Court hereby modifies its Memorandum and Order of Dismissal entered September 16, 2003.

The above is hereby STAYED pending further order of the Court.

SO ORDERED.

Avern Cohn
United States District Judge

Dated: Jan 04 2005

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
No. 03-2258

FILED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMANTHA BATES, Plaintiff-Appellant,	)
v.	) On Appeal from the United States District Court for the
VAN BUREN TOWNSHIP, Defendant-Appellee.	) Eastern District of Michigan

Before: BOGGS, Chief Judge: Gilman, Circuit Judge: and WEBER, Senior District Judge *

PER CURIAM. Plaintiff- Appellant Samantha Bates appeals from the dismissal of her § 1983 claim against the nudity and licensing ordinances of Van Buren Township. Bates argues that the district court erred in invoking *Colorado River* abstention due to the existence of a parallel state court proceedings. We affirm the decision to abstain, but modify the district court order to require a stay of proceedings, rather than a dismissal without prejudice.

I

Samantha Bates is an exotic dancer. She works as an independent contractor for Garter Belt, which is located in Van Buren Township (the " Township"). In March of 1999 the Township

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* The Honorable Herman J. Weber, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

enacted a "nudity ordinance" to restrict nudity in establishments that serve alcohol. In pertinent part, the ordinance reads:

> (1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

A separate "licensing ordinance" also requires a Township license for any person providing services as a" dancer or entertainer" in any establishment " offering a kind of show emphasizing specified sexual activities or specified anatomical areas." Starting in August 2000 the Township sought to enforce the ordinances against Garter Belt and Bates.

Bates filed this action under 42 U.S.C. § 1983 on September 13, 2002. She alleges that both nudity ordinance and the licensing ordinance are unconstitutional in violation of the first and fourteenth amendments.

A. Garter Belt Litigation

Bates's suit is one of several cases involving the

Township's nudity ordinance. On November 6, 2000, the Township sought, in state court, a permanent injunction against Garter Belt, requiring it to comply with the nudity ordinance ("*Garter Belt I*"). Garter Belt raised a constitutional defense and, on December 13, 2000, removed the case to federal court against the Township. ("*Garter Belt II*") claiming that both the nudity ordinance and the licensing ordinance were unconstitutional. *Garter Belt I* and *Garter Belt II* were consolidated and heard before the same judge.

The district court remanded *Garter Belt I* on the grounds that a federal defense does not create a basis for federal jurisdiction. It then dismissed *Garter Belt II* without prejudice, reasoning that it should abstain from deciding the case out of deference to the parallel state court proceedings in *Garter Belt* I.

The decision to dismiss *Garter Belt II* on abstaining grounds was affirmed by this court on June 2, 2003. *Garter Belt Inc. v. Van Buren Township*, 66 Fed Apprx. 612 (6th Cir. 2003)(unpublished)("*Garter Belt III*"). We found that all three conditions for abstention laid out in *Younger v. Harris* , 401 U.S. 37 (1971) , were satisfied. *Garter Belt III*, 66 Fed. Appx.. at 614-15. First, a parallel case between the same parties, *Garter Belt I*, was pending in state court. Id. at 614. Second, the state had an " important interest in enforcing its state and local liquor licensing and obscenity codes." Id. at 614 (citing *Coper v. Parrish*, 203 F.3d 937,954 (6th Cir. 2000)). Third, we found that Garter Belt had the opportunity to raise all its claims in the state court proceeding. Id. at 615.
We also noted that the presence of an additional claim in *Garter Belt II-the* challenge to the licensing ordinance- did not bar abstention because the claim could also be raised in state court. Ibid.(citing *Carroll v. City of Mount Clemens*, 139 F3d. 1072, 1074-75 (6th Cir. 1998)).

Meanwhile, *Garter Belt I* continued in Wayne County, Michigan, Circuit Court. On December 11, 2001, that court issued a permanent injunction against Garter Belt, in the process upholding the ordinance and dismissing counterclaims. In a lengthy opinion, the Michigan Court of Appeals affirmed on September 25, 2003. *Van Buren Township v. Garter Belt, Inc.*, 673 N.W.2d 111 (Mich. App. Ct. 2003). The Michigan Supreme Court declined to hear the appeal on June 24, 2004. *Charter Township of Van Buren v. Garter Belt, Inc.*, 682 N.W, 2d 86 (Mich . 2004). A Petition for Certiorari, filed on September 22, 2004, is pending before the United States Supreme Court.

B. The Proceedings Below

On September 16, 2003, the federal district court dismissed Bates's suit without prejudice on abstention grounds, citing *Colorado River Water Conservation Dist. V. United States*, 424 U.S. 800 (1976). The court determined that this case was parallel to *Garter Belt I* because they both concerned the constitutionality of the Township's nudity ordinance. It then weighed several *Colorado River* factors, and concluded that the state forum could hear all claims and offer complete relief, and that abstention was therefore warranted to avoid piecemeal litigation. The court also found that because the ordinance contained a severability clause and *Garter Belt I* raised state issues, the ordinance could be modified in state court. Finally, the district court noted that it is "surely more than a mere coincidence" that Bates's attorney also represented Garter Belt in another case and that she was a dancer at the Garter Belt. It characterized this case as " yet another attempt to gain a federal forum."

II

There is conflicting precedent within this circuit as to

the appropriate standard of review for abstention decisions. Most panels have reviewed de novo. See, e.g., *Rouse v. DaimlerChrysler Corp.*, 300 F. 3d 711 (6th Cir. 2002). The de novo standard was first articulated in *Traughber v. Beauchane*, 760 F.2d. 673, 676 (6th Cir. 1985), which explained that " [b]ecause theories of state and federal law, and expressions of federal law, and expressions of federalism and comity, are so interrelated in the decision to abstain such dispositions are elevated to a level of importance dictating de novo appellate review."

A few decisions, however, have reviewed abstention decisions for abuse of discretion. *Great Earth Companies, Inc. v. Simons*, 288 F.3d 878, 886 (6th Cir. 2002); *Romine v. Compuserve Corp.*, 160 F.3d. 337, 341-43 (6th Cir. 1998) (concluding that the district "court's decision was not an abuse of discretion"). For the abuse of discretion standard of review, these cases rely upon *Moses H. Cone Memorial Hosp. V. Mercury 'const. Corp.*, 460 U.S. 1, 19 (1983). *Moses H. Cone* does not explicitly state the standard of review, although it does suggest abuse of discretion is the proper standard. Ibid. ("[W]e agree with the Court of Appeals that the District Court in this case abused its discretion in granting the stay."). Since the district court was found to have abused its discretion, the outcome would have been the same under de novo review, and the Court never considered explicitly which standard was appropriate.

The circuits are also split on the proper standard of review. Compare *Silverman v. Silverman*, 267 F. 3d 788,792 (8th Cir. 2001) (reviewing abstention for abuse of discretion) and *For Your Eyes Alone, Inc. v. City of Columbus, Ga.*, 281 F. 3d 1209, 1216 (11th Cir. 2002) (same) with *American Consumer Pub. Assn'n, Inc. v. Margosian*, 349 F. 3d 1122, 1125 (9th Cir. 2003) (reviewing abstention de novo) and *Diamond Const. Corp. V. McGowan*, 282 F. 3d 191, 197-98 (2nd Cir. 2002) (same.)

We conclude that *Traughber* requires us to review abstention decisions de novo. As an original matter, *Great Earth's* reading of *Moses H. Cone* may be correct. But *Moses H. Cone* is at least somewhat ambiguous, and *Traughber's* subsequent interpretations controls.

III

In *Colorado River*, the Supreme Court held that federal courts may abstain from hearing a case solely because there is similar litigation pending in state court. 424 U.S. at 818. *Colorado River* abstention rests on considerations of "wise judicial administration" and the general principle against duplicative litigation. Id at 817. These factors create a "narrow exception" to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Ibid.

The threshold question in *Colorado River* abstention is whether there are parallel proceedings in state court. *Crawley v. Hamilton County Comm'rs*, 744 F. 2d 28, 31 (6th Cir. 1984). The state court proceedings need not be identical, merely "substantially similar." *Romine v. Compuserve Corp.*, 160 F. 3d 337, 340 (6th Cir. 1998). There is also no requirement that the parties in the state court proceedings be identical to those in the federal case. *Heitmanis v. Austin*, 899 F. 2d 521,528 (6th cir. 1990).

This case is clearly parallel to *Garter Belt* I. Both cases are principally about the constitutionality of the Township's nudity ordinance and allege the same constitutional infirmities. To the extent the two suits differ, it is that *Garter Belt I* includes claims that state law preempts the ordinance and that the ordinance violates the Michigan State Constitution. *Garter Belt III*, 66 Fed. Appx. At 613. The fact that the state action is broader than the federal is no bar to *Colorado River* abstention, because this fact can only make it more likely that it will not be necessary for the federal courts to determine the federal question. See *Romine*, 160 F. 3d at 340.

Having established that there are parallel state

proceedings, we must next examine whether judicial economy warrants abstention. We have summarized the various factors from *Colorado River* and subsequent cases as follows:

> (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; and (4) the order in which jurisdiction was obtained....(5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction. These factors, however, do not comprise a mechanical checklist. Rather, they require "a careful balancing of the important factors as they apply in a give[n] case" depending on the particular facts at hand.

Romine, 160 F. 3d at 34041 (citations omitted).

Three of these factors weigh against abstention. First, this case does not involve a res. Second, there is no reason to think the federal forum is less convenient. Finally, the governing law in this case is federal, but, but the Supreme Court has stated that the source-of-law factor is less significant when the states and federal courts have concurrent jurisdiction. *Moses H. Cone.*, 460 U.S. at 25.

The remaining factors militate in favor of abstention. First, the federal suit was filed almost two years after the state suit. The state court took jurisdiction of *Garter Belt I* in November 2000, but the initial complaint in this case was not filed until September, 2002. Second, the state court proceedings were clearly well advanced when the district court considered the case. At the time the district court heard this case, *Garter Belt I* was already on appeal in the Michigan Court of appeals.

Third, we expressly found that the state court proceedings adequately protected the parties' federal rights in *Garter Belt III*, 66 Fed. Appx. At 615. Fourth, since the state courts were already considering constitutional challenges to the nudity ordinance, the district court avoided piecemeal litigation by abstaining. Finally, state and federal courts have concurrent jurisdiction over federal constitutional issues.

We think the district court was correct to abstain on the basis of *Colorado River*. Our focus in these cases, once we have found that a parallel state proceeding exists, has been on the relative progress of the state and federal proceedings. See *PaineWebber, Inc. v. Cohen*, 276 F. 3d 197, 207-08 (6th Cir. 2001) (finding that two-day delay between the filing of state and federal suits was not a sufficient reason for abstention given that there was no significant progress in the state court suit); *Great Earth*, 288 F. 3d at 887 (finding that abstention was not warranted because, although state suit was filed first, the federal proceeding was actually more advanced.) Here it is quite clear that the state proceedings arising from *Garter Belt I* are far more advanced than this case.

Our precedents support the conclusion that the substantial difference in the relative advancement of the state and federal proceedings justifies abstention. The situation here is most analogous to *Romine*, where we affirmed abstention in a class action securities fraud case when the same federal claims had been brought in state court one month before the federal case was brought. 160 F. 3d at 338-40. In *Romine*, as in this case, both the state and federal actions contained identical federal claims and the state court suit included additional state law claims. Ibid. We found it significant in *Romine* that the state proceedings were well into discovery, whereas the federal proceedings were still in the initial pleading stage. Id at 341-42. Here the state proceeding is even more advanced; at the time the district court dismissed, Garter Belt I had already been heard by the *Michigan Court of Appeals*. See *Bd. of Education of*

Valley view Community Unit School Dist. v. Bosworth, 713 F. 2d 1316, 1321-22 (7th Cir. 1983) (finding that when a parallel state court case is on appeal, the reasons for *Colorado River* abstention are stronger). Thus the differences between this case and *Romine* cut in favor of abstention - this case involves a greater delay between the filing of the state and federal suits and a greater disparity between the relative advancement of the state and federal proceedings.

IV

Having found that *Colorado River* abstention is appropriate, the remaining issue is whether the case should be dismissed or stayed. Although we have never explicitly prohibited district courts from dismissing cases when abstaining under Colorado River, issuing a stay of proceedings has been the general practice. See *Romine*, 160 F. 3d at 338 (affirming a district court stay of a case on the basis of *Colorado River* abstention); *Holmes Financial Associates, Inc. v. Resolution Trust Corp.*, 33 F. 3d 561, 562 (6th Cir. 1994) (same). In similar circumstances, other circuits have generally required district courts to issue a stay rather than dismiss without prejudice. *Moorer v. Demopolis Waterworks and Sewer Bd.*, 374 F. 3d 994, 998 (11th Cir. 2004) (requiring a stay, not dismissal, when exercising *Colorado River* abstention.); *LaDuke v. Burlington Northern R. Co.*, 879 F. 2d 1556, 1561-62 (7th Cir. 1989) (requiring a stay because it lessens concerns over the statute of limitations, enables the parties to return to the judge who is already familiar with the case, and generally protects all the rights of the parties without imposing any additional burden on the district court); *Mahaffey v. Bechtel Assoc. Prof'l Corp.*, 699 F. 2d 545, 546-47 (D.C. Cir. 1983) (holding that a stay is required because it "effectively conserve[s] court resources while avoiding premature rejection of the litigants' access, as specified by statute, to a federal forum"); *Kelser v. Anne Arundel county Dept of Social Services*, 679 F. 2d 1092, 1094-95 (4th Cir. 1982) (affirming abstention in a § 1983 action, but

in this case, it will prevent statute of limitations problems. Requiring refiling also imposes small, but non-zero, costs and delay upon the plaintiff. A stay of proceedings is also more efficient from the court's point of view, since the post-abstention case would stay with the original judge, who is familiar with the case, rather than be assigned a new judge. An indefinite stay of proceedings also imposes no additional burden to the court. We therefore join other circuits in requiring a stay of proceedings rather than a dismissal in Colorado River abstention cases.

V.

Garter Belt I is clearly parallel to this case. As the state proceedings are substantially more advanced than this federal suit, the Colorado River factors, on balance, favor abstention. Therefore, we AFFIRM, but modify the dismissal order to require a stay of proceedings.

CLOSED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SAMANTHA BATES,
Plaintiff,

v.

TOWNSHIP OF VAN BUREN,
Defendant.

JUDGMENT IN CIVIL CASE
Case Number: 02-73692
Honorable Avern Cohn

■ **Decision by Court.** This action came to hearing before the Court. The issue have been heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that for reasons stated in the Court's Memorandum and Order of Dismissal entered and filed this date, the above case is DISMISSED without prejudice.

Pursuant to Rule (77d). FRCivP
Copies have been mailed to :
Michael Donaldson and David Szymanski

I hereby certify that the foregoing is a true copy of the original on file in this Office.
CLERK, U.S DISTRICT COURT EASTERN DISTRICT OF MICHIGAN

By_____
Deputy Clerk

Date: September 16, 2003

David Weaver, Clerk of Court

_____

JUDY CASSIDY Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMANTHA BATES,
Plaintiff,

v.

TOWNSHIP OF VAN BUREN
Defendant.

Case No.02-73692
HON. AVERN COHN

/

MEMORANDUM AND ORDER OF DISMISSAL

I. Introduction

This is a civil rights case under 42 U.S.C. § 1983. Plaintiff Samantha Bates (Bates) is suing defendant Van Buren Township claiming that Township Ordinance 2-16-99(2)[1], entitled Nudity on Licenses Premises (the Nudity ordinance), violates her First and Fourteen Amendment rights. Bates is an exotic/topless dancer at the Garter Belt, Inc. d/b/a Legg's Lounge (the Garter Belt) located in Van Buren Township and licensed to sell alcoholic beverages on its premises. The Nudity ordinance essentially prohibits a person appearing in a state of " nudity" from frequently, loitering in, working in, or performing in an establishment licensed by the Michigan Liquor Control Commission. The Nudity ordinance also prohibits a proprietor or operator of such an establishment from allowing a person in a state of " nudity" to be present in the establishment. Bates generally says that the Nudity ordinance does not pass constitutional muster because it does not further

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1. Bates also claims that Township Ordinances 22-106 through 22-112 are unconstitutional. However, as Van Buren Township notes these ordinances were superceded and replaced by Township Ordinance 02-16-99(2). The only ordinance at issue therefore is Township Ordinance 02-16-99(2), as Bates concedes in her motion papers.

an important or substantial governmental interest and is also overbroad.[2]

Before the Court are cross motions for summary judgment.[3] Both parties spend a good deal of effort arguing the merits of the case. However, the constitutionality of the Nudity ordinance is being considered by the Michigan Court of Appeals in a parallel proceedings brought by the Garter Belt, the establishment where Bates works. Accordingly, for the reaons that follow, this case is DISMISSED WITHOUT PREJUDICE, based on the abstention doctrine described in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

II. Background

A. The Nudity Ordinance

In 1999, an Buren Township enacted a series of ordinances addressing sexually oriented businesses, commonly called SOB ordinances. The nudity ordinance at issue here was one such SOB ordinance. It provides in relevant part follows:

> Nudity on Licensed Premises.
>
> > (1) No person, while appearing inn a state of nudity as defined by this section, shall frequent, loiter, work or perform in any

---

2. This characterization of Bates' claims is taken from her motion for summary judgment.

3. As Van Buren Township notes, there has been no discovery in this case yet both parties have filled dispositive motions.

establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment of any person who violates the provisions of this section.

(2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-thought clothing articles or body stocking:

(a) the whole or part of the pubic region;

(b) the whole or part of the anus;

(c) the whole or part of the buttocks;

(d) the whole or part of the genitals;

(e) the breast area including nipple, or more than one-half of the area of the breast.

B. Enforcement Efforts

Dancers at the Garter Belt, including Bates, regularly

have exposed their "breast area including nipple, or more than one-half of the area of the breast" while patrons were served alcoholic beverages both before and after the Nudity ordinance enacted. On August 29, 2000, Van Buren Township sent a letter to the owner of the Garter Belt stating that the Garter Belt was in violation of the Nudity ordinance and requested that the violations stop.

C. Count Actions

The Garter Belt apparently did not comply with the Nudity Ordinance because Van Buren Township filed suit in Wayne County Circuit Court on November 6, 2000, seeking a permanent injunction that would require the Garter Belt to comply with the Nudity ordinance. (Garter Belt I) In that case, the Garter Belt raised the defense that the Nudity ordinance is unconstitutional.

On December 13, 2000, the Garter Belt removed the case to federal court where it was assigned to another judge in this district. Charter Township of Van Buren v. The Garter Belt, no. 00-75395. Two weeks later, on December 28, 2000, the Garter Belt filed a case in federal court against Van Buren Township challenging the scheme of Van Buren Township's SOBs, including the constitutional validity of the Nudity ordinance (Garter Belt II). The Garter Belt Inc. v. Charter Township of Van Buren, no. 00-75630. Garter Belt I and Garter Belt II were consolidated and heard before the same judge.

In Garter Belt I, following an order to show casue, the court remanded the case to Wayne County Circuit Court for lack of subject matter jurisdiction on the grounds that the Garter Belt's federal defenses to the ordinances (that it is unconstitutional) do not provide a basis for federal jurisdiction.

III. Analysis

The fact that the very establishment wher Bates words, the Garter Belt, is litigating the constitutionality of the Nudity ordinance in state court is dispositive to the manner in which this case must be resolved. Although both parties appear to want the Court rule on whether the Nudity ordinance is constitutional,[4] this question is currently being considered by Michigan courts.

In Colorado River, surpa, the Supreme Court held that in "exceptional circumstances, a federal district court may stay or dismiss an action solely because of the pendency of similar litigation in state court. Id. at 818. The Supreme Court held that " considerations of 'wise judicial administration, giving regard to conservation of judicial resources'" created a narrow exception to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Id. at 817. The principles underlying this doctrine "rests on consideration s of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,'" Id.

Before the Colorado River doctrine can be applied, the Court must first determine that the concurrent state and federal actions are actually parallel. See Crawley v. Hamilton County Comm'rs, 774 F.2d 28(6th Cir. 1984). "[E]xact parallelism" is not required:[I]t is enough if the two proceedings are substantially similar ." Nakash v. Marciano, 882 F.2d 1411,

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4. Van Buren Township filed a supplemental paper following oral argument discussing the applicability of a case that Bates cited at oral argument. Peek-A-Boo Lounge v. Manatee County, ___F.3d ___, 2003 WL 21649675 (11th Cir. July 15, 2003), evidencing another attempt to argue the merits of the case.

1416 (9th Cir. 1989).

Here, Garter Belt I and this case are parallel because both cases concern the constitutionality of the same Nudity ordinance. While the parties are not identical, identical parties are not required for application of Colorado River. See Romine v. Compuserve Corp., 160 F.3d 337, 340 (6th Cir. 1998); Heitmanis v. Austin, 899 F. 2d 521, 528 (6th Cir. 1990)(stating that the fact the parties in the state case are different from the parties in the federal case " is not relevant to Colorado River abstention.")

In any even, the parties are substantially similar. Bates asserts in her amended complaint that the Nudity ordinance was' directed to put The Garter Belt out of business and effectively destroy [Bates's] only place available for rental adult dancing in Van Buren Township." Amended Complaint at ¶ 29. Bates and the Garter Belt therefore share the same interest in striking down the Nudity ordinance. Moreover, the defendant, Van Buren Township, is the same in both cases. Although the Garter Belt is challenging other SOB ordinances in addition to the Nudity ordinance, this does not mean that the cases are not related. Rather, it simply means that Garter Belt I is a more comprehensive case than this case. This does not defeat application of Colorado River. See Romine, supra. The fact is that the Nudity ordinance is being challenged as constitutionally infirm in both cases. Thus, the cases are parallel for purposes of Colorado River.

Having found that the cases are parallel, the Court must consider the following factors in deciding whether to defer to the concurrent jurisdiction of the state court:

> (1) whether the state court has assumed jurisdiction over any

> res or property;(2) whether the federal forum is more convenient to the parties; (3) avoidance of piecemeal litigation ;and (4) the order in which jurisdiction was obtained.... (5) whether the source of governing law is state or federal, (6) the adequacy of the state court action to protect plaintiff's rights. (7) the relative progress of the state and federal proceedings' and (8) the presence or absence of concurrent jurisdiction. These factors, however, do not comprise a mechanical checklist. Rather, they require "a careful balancing of the important factors as they apply in a give case" depending on the particular facts at hand.

Romine, 160 F.3d at 340-41 (citations omitted). Also important is the availability of complete relief in the state court. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1. 26-27 (1983)

A careful balancing of these factors leads to the conclusion that abstention is appropriate The first factor- whether a res is involved- has no application. Because both forums are convenient. the second factor weighs against abstention.

The remaining factors, however, all weigh in favor of

abstention. Adjudicating this case is this Court would result in piecemeal litigation since the outcome of both cases turns on the constitutionality of the Nudity ordinance. The state court first assumed jurisdiction in Garter Belt I. While the source of the law is federal, the state courts have concurrent jurisdiction over federal constitutional issues. Indeed, another judge in this district and the Sixth Circuit recognized as much in dismissing Garter Belt I on other abstention grounds in part because Garter Belt's ability to raise all of its federal claims in state court. Important also is the fact that the resolution of state law issues in Garter Belt I may render federal constitutional rulings unnecessary. Finally, complete relief is available in state court as both the Garter Belt and Bates seek the same relief- a rulint that the Nudity ordinance is unconstitutional.

IV. Coda

The Court cannot help but note that the present case is brought by an exotic dancer at the very same establishment which is currently challenging the same Nudity ordinance in state court , is yet another attempt to gain a federal forum after another judge in this district refused to entertain such claims and after his decision was affirmed by the Sixth Circuit. Although the attorneys representing the Garter Belt and Bates are not the same, the attorneys representing Bates are the same attorneys who are representing the owner of the Garter Belt in another case on the Court's docket. This is surely more than mere coincidence.

SO ORDERED

AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: Sep 16 2003
Detroit, Michigan

CHARTER TOWNSHIP OF VAN BUREN
ORDINANCE NO. 2-16-99 (2)

The Charter Township of Van Buren Orders:

That the Code of Ordinances, Charter Township of Van Buren, Michigan, is hereby amended by adding a section, to be numbered 6-69, which section shall read as follows:

Sec. 6-69 Nudity on Licensed Premises.

(1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or perform in any establishment, licensed or subject to licensing by the Michigan Liquor control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

(2) "nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:

(a) the whole or part of the pubic region;
(b) the whole or part of the anus;
(c) the whole or part of the buttocks;
(d) the whole or part of the genitals;
(e) the breast area including nipple, or more than one-half of the area of the breast.

(3) Every word, sentence, clause and provision of thes section is hereby declared to be severable, and if any word, sentence, clause, provision or part thereof is declared to be invalid by a court of competent jurisdiction, the remaining

provisions shall not be affected.

(4) The provisions of any or all code sections or subparts thereof in conflict herewith are repealed only to the extent necessary to give this section full force and effect.

(6) the provisions of this section shall become effective upon its passage by the VanBuren Charter Township Board of Trustees and upon publication in accordance with the Township Charter and the statutes of the State of Michigan.

Yea HART, CLARK, BUDD, KING, FOSTER AND HERMAN.
Nay NONE
Absent ROCHOWIAK

Ordinance Declared Adopted:

_____
Cindy King, Township Clerk

_____
Helen Foster, Supervisor

Adopted: 03-02-99
Published: 02-25-99 & 3-11-99
Effective: 03-11-99

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan Municipal Corporation,
Plaintiff.

Case No. 00- CZ
Hon.

vs.

THE GARTER BELT INC., a Michigan
Corporation, d/b/a Legg's Lounge,
Defendant

_____/

PATRICK B. MCCAULEY (17297)
DAVID J. SZYMANSKJ (P40734)
Sommers, Schwartz,
Silver & Schwartz P,C.
Attorneys for Plaintiff
2000 Town Center, Suite 900
Southfield, Ml 48075
(248) 355-0300

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this complain that is either pending or was previously filed and dismissed, transferred or otherwise disposed of after having been assigned to a judge in this court.

COMPLAINT SEEKING INJUNCTIVE RELIEF

NOW COMES Plaintiff Charter Township of Van Buren, by and through its attorneys Sommers, Schwartz, Silver & Schwartz, P.C., and for its Complaint against the above - named Defendant, states unto this Honorable Court as follows:

COMMON ALLEGATIONS

1. At all times material hereto, Plaintiff Charter Township of Van Buren was a Michigan Municipal Corporation Located in the County of Wayne and State of Michigan

2. At all times material hereto, Defendant The Garter Belt, Inc. was a Michigan corporation doing business as Legg' Lounge located, conducting business and with its registered office and principal place of business in the City of Belleville, County of Wayne and State of Michigan.

3. The residence agent of Defendant The Garter Belt, Inc. is John Hamilton located at 50778 Michigan Ave. Belleville, Ml 48111.

4. The Court has jurisdiction over this matter specifically because of the equitable nature of the relief requested.

5. Venue is proper in this Court pursuant to MCL § 66.1621 (a)

COUNT 1
REQUEST FOR INJUNCTIVE RELIEF

6 The Plaintiff hereby realleges and reaffirms each and very allegation contained in paragraphs I through 5 of this Complaint as though filly set forth therein.

7. Defendant The Garter Belt, Inc. doing business as Legg's

Lounge operates am adult entertainment establishment located at 50778 Michigan Ave., Belleville, MI. 48111 that does now feature topless female dancers.

8. Defendant The Garter Belt's Legg's Lounge is a business establishment that serves alcoholic beverages to patrons and is an establishment licensed or subject to licensing by the Michigan Liquor Control Commission. (MLCC)

9. Pursuant to USCA Cons. Amend. 21, MCLA Const. An. 4, Sec. 40 and MCLA 436.1(2), local communities within the State of Michigan, including Plaintiff Charter Township of Van Buren, are, within the proper exercise of their police powers, granted the power to control alcoholic beverage traffic within their boundaries, despite the fact that the State of Michigan also has granted the power to control alcoholic beverage traffic on a statewide basis to the MLCC.

10. Effective March 11, 1999, Plaintiff Charter Township of Van Buren properly adopted a series of zoning and other ordinances related to the licensing and operation of what are known as sexually oriented businesses (SOBs) within the boundaries of the Plaintiff Township.

11. Both prior to and after the adoption of the aforesaid ordinances, Defendant The Garter Belt's Legg's Lounge has featured topless female dancers, and, as a result, the Defendant's Legg's Lounge is an SOB within the meaning of the aforesaid SOB ordinances adopted by Plaintiff Charter Township of Van Buren.

12. Ordinance 02-16-99(2) effective on March 11, 1999 that amended The Code of Ordinances of the Charter Township of Van Buren by adding ordinance section 6-69 entitled Nudity on Licensed Premises (Exhibit A) at Subsection (1) provides as follows:

> No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or preform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

13. The topless female dancers performing at Defendant The Garter Belt's Legg's Lounge are appearing in a state of nudity as defined by Ordinance 02-16-99(2) of the Charter Township of Van Buren though section 6-69 at Subsection (2) and are in violation of the aforesaid ordinance.

.14. By allowing topless female dancers to performat its Legg's Lounge, Defendant The Garter Belt, Inc. is in violation of Ordinance 02-16-99(2) of the Charter Township of Van Buren through section 6-69 at Subsection (1).

15. On August 29,2000, Bryce Kelley, Director of Development for Plaintiff Charter Township of Van Buren, sent a letter to John Hamilton, the resident agent and owner/operator of Defendant The Garter Belt, Inc., notifying Mr. Hamilton of the existence of the aforesaid ordinance, notifying the Defendant of its continuing violation of the ordinance in question and directing the Defendant to comply with the requirements of the subject ordinance.

16. Despite receiving the aforesaid notice of ordinance violation, and despite other efforts to have Defendant The Garter Belt, Inc. comply with the subject ordinances, the Defendant has failed and otherwise re refused to comply with

the ordinances of the Plaintiff in question and is in continuing and flagrant violation of the same.

17. The continuing and flagrant violation by Defendant The Garter Belt, Inc of the aforesaid ordinance is causing irreparable harm to the citizens of Plaintiff Charter Township of Van Buren and is undermining the Plaintiff's ability to address undesirable secondary and other effects stemming from the combination of alcohol consumption and public nudity.

18. As direct and proximate result of the aforesaid wrongful conduct of Defendant The Garter Belt Inc., the citizens of Plaintiff Charter Township of Van Buren are being subjected to and will continue to be subjected to irreparable harm for which there is no adequate remedy at law.

19. This Court, in the exercise of its equitable powers, may enter whatever orders it deems appropriate to prevent the Defendant from violating the ordinance that it the subject of this action and to prevent the operation of Legg's Lounge in a manner that causes irreparable harm to the citizens of Plaintiff Charter Township of Van Buren

WHEREFORE, the Plaintiff respectfully requests that this Honorable Court enter it's Order permanently enjoining the Defendant from allowing female topless dancing in a state of nudity as described in the subject ordinances while serving alcoholic beverages to patrons.

SOMMERS, SCHWARTZ,
SILVER & SCHWARTZ, P.C.

By:_____
DAVID J. SZYMANSKI (P40734)
Attorneys for Plaintiff
2000 Town Center, Suite 900

Southfield, MI 48075
(248) 355-0300

Dated: November 2, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation,
Plaintiffs, Case No. **OO7-75395**
Hon. **GEORGE CARAM STEEH**
MAGISTRATE JUDGE PEPE
Wayne County Circuit Court
Case No. 00-036479-CZ
Hon. Jeanne Stempien

v.

THE GARTER BELT INC. A Michigan
Corporation, d/b/a/ LEGG'S LOUNGE
Defendants
_____/

PATRICK B. MCCAULEY (P17297)
DAVID J. SZYMANSKI (P40734)
Sommers, Schwartz, Silver & Schwartz, P.C.
Attorneys for Plaintiff
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

BRADLEY J. SHAFER (P36604)
Shafer & Associates, P.C.
Attorney for Defendant
3800 Capital City Blvd., #2
Lansing, Michigan 48906-210
(517) 886-6560

Stephen H. Boak (P10912)

Sempliner, Thomas & Boak
Co-Counsel for Defendant
711 W. Ann Arbor Trail
Plymouth, MI 48170-1677
(313) 455-4560

ALLAN S. RUBIN (P44420)
Rubin & Rubin, P.L.L.C.
Co-Counsel for Defendant
24460 Telegraph Road
Southfield, Mi 48034
(248) 356-1220

_____/.

NOTICE OF REMOVAL

NOW COMES Defendant, Garter Belt, Inc. by and through co-counsel, Sempliner, Thomas & Boak, and hereby petition this Court, pursuant to Title 28, U.S.C.A. § 1441, § 1443 and § 1446 for removal of the above entitled cause to the United States District Court for the Eastern District of Michigan, Southern division, for the following reasons:

1. That on or about November 6, 2000 Plaintiff, Charter Township of Van Buren, filed a complaint against Defendant, Thar Garter Belt, Inc. alleging in part, that:

   9. Pursuant to USCA Const. Amend. 21, MCLA Const. Art. 4, Sec. 40 and MCLA 436.1(2), local a communities within the State of Michigan, including Plaintiff Charter Township of Van Buren, are, within the proper exercise of

their police powers, granted the power to control alcoholic beverage traffic within their boundaries, despite the fact that the State of Michigan also has granted the power to control alcoholic beverage traffic on a statewide basis to the MLCC.

10. Effective March 11 , 1999, Plaintiff Charter Township of Van Buren adopted a series of zoning and other ordinances related to the licensing and operation of what are known as sexually oriented businesses (SOBs) within The boundaries of the Plaintiff Township.

11. Both prior to and after the adoption of the aforesaid ordinances, Defendant The Garter Belt's Legg's Lounge has featured topless female dancers, and, as a result, the Defendants Legg's Lounge is an SOB within the meaning of the aforesaid SOB ordinances adopted by Plaintiff Charter Township of Van Buren.

2. Plaintiffs further alleged that Defendant continued to operate with topless female dancers in violation of its newly adopted ordinances and that despite receiving notice of the ordinances, continued to operate. Plaintiff alleged that:

17. The continuing and flagrant violation by Defendant The Garter Belt, Inc. of the

> aforesaid ordinance is causing irreparable harm to the citizens of Plaintiff Charter Township of Van Buren and is undermining the Plaintiff's ability to address undesirable secondary and other effects stemming from the combination of alcohol consumption and public nudity.

3. Plaintiff asked, as prayer for relief, that Defendant be "permanently enjoined.../ from allowing topless dancing in a state of nudity as described in the subject ordinances while serving alcoholic beverages to patrons"

4. In addition, Plaintiff filed a "Ex Parte Motion to Show Cause and for Permanent Injunction" and attached thereto a Brief in Support

5. In the Brief in Support of the Ex Part Motion to Show Cause and for Permanent Injunction, Plaintiff cited, as authority, California v. LaRue 609 US, 93 SCT 39, 34 Led2d 342 (1972):

> ...for the proposition that the 21st Amendment confers upon states broad power over the sale of alcohol which outweighs any First Amendment interest in nude dancing. In LaRue, the Supreme Court rejected

challenges under the First and Fourteenth Amendments to regulations prohibiting certain sexually explicit live entertainment or films in establishments licensed to sell alcoholic beverages, notwithstanding that the regulations proscribed conduct within the limits of the First Amendment protection of freedom of expression.

6. Plaintiffs clearly and expressly raises the issues of the First Amendment and by implication, the Fourteenth Amendment, and the Twenty First Amendment of the Constitution.

7. Plaintiffs assert that the ordinances in question doe not violate the United States Constitution and, under 42 USC 1983, this action could have been filed in this Court under 28 USC § 1331, § 1441, §1443, and §1446 is removable upon petition to this Court.

8. Defendant was not served with Summons or the Motion to Show Cause until November 10, 2000 or some time thereafter.

9. That at the time this Notice was prepared for filing, the time for filing this Notice of Removal had not expired and was made timely pursuant to 28 USC § 1446. However, because of severe snow, the Court closed early on December 11, 2000., in addition, travel was restricted and Defendant received no

response to repeated calls to this Court on December 12, 2000. Defendant made every attempt to file this Notice on December 11, 2000, but was unable, because of the early closing and severe weather, to file it until December 13, 2000.

10. That written notice of filing of this Removal has been given to all parties as required by law and the Wayne County Circuit Court.

11. That a copy of this Removal has also been file with the Clerk of the Court for the Circuit Court for the County of Wayne, State of Michigan.

12. That attached hereto and incorporated by reference is copy of all of the documents filed in the Circuit Court and which have been served upon the parties.

WHEREFORE, Defendant and Petitioners respectfully request that it may effect removal of the within action from the Circuit Court for the County of Wayne, State of Michigan, to the Untied States District Court for the Eastern District of Michigan, Southern Division.

Respectfully Submitted,
SEMPLINER, THOMAS & BOAK

Date: Dec.12, 2000

By: /s/
Stephen H. Boak (P10912)
Co-counsel for Defendant
711 W. Ann Arbor Trial
Plymouth, MI 48170-1677
(313) 455-4560

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE GARTER BELT, INC., a Michigan corporation, **d/b/a LEGG'S LOUNGE,** **00-60455**

Plaintiff, MARRIANNE O. BATTANI
MAGISTRATE JUDGE MORGAN

v.

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation,
Defendant.

_____/

BRADLEY J. SHAFER (P36604)
Shafer & Associates, P.C.,
Co-Counsel for Plaintiff
3800 Capital City Blvd., #2
Lansing, Michigan 48906-210
517/886-6560

STEPHEN H. BOAK (P10912)
Sempliner, Thomas & Boad
Co-Counsel for Plaintiff
711 W. Ann Arbor Trail
Plymouth, MI 48170
734/455-4560

ALLAN S. RUBIN (P44420)
Rubin & Rubin, P.L.L.C.,
Co-Counsel for Plaintiff
24460 Telegraph Road
Southfield, Michigan 48034
248/356-1220

PATRICK B. McCAULEY (P17297)
DAVID J. SZYMANSKI (P40734)
Sommers, Schwartz
Silver & Schwartz, P. C.
Attorneys for Defendant
2000 Town Center, Suite 900
Southfield, MI 48075
248/355-0300

CORBETT EDGE OMEARA (P54716)
Co-Counsel for Plaintiff
407 E. Fort Street, Suite 110
Detroit, Michigan 48226
313/399-5300

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A civil action between these parties or other parties arising out of the same transaction or occurrence as alleged in this Complaint has been previously filed in the Wayne County Circuit Court and removed In the United States District Court Eastern District of Michigan, Southern Division, where it was given docket number 00-75395 and was assigned to **Judge George C. Steeh.** That action remains pending.

/s/
ALLAN S. RUBIN (P44420)

COMPLIANT FOR PRELIMINARY AND PERMANENT INJUNCTION PURSUANT TO 42 USC 1983, DECLARATORY RELIEF AND ATTORNEY FEES PURSUANT 1042 USC 1988 AND DEMAND FOR TRIAL BY JURY

NOW COMES the Plaintiff hereinafter referred to as 'Plaintiff' by and through its attorneys, SHAFER & ASSOCIATES, P.C., RUBIN & RUBIN, P.L.LC., and SEMPLINER, THOMAS AND BOAK and for it's Complaint against the Defendant hereinafter referred to as "Defendant', the CHARTER TOWNSHIP OF VAN BUREN states as follows:

I. PARTIES AND JURISDICTION

1 That at all times relevant hereto, the Plaintiff, THE GARTER BELT, INC., d/b/a LEGG'S LOUNGE (hercinafter referred to as"LEGG'S') was and is a duly authorized corporation located within the TOWNSHIP OF VAN BUREN, County of Wayne, and State of Michigan. LEGG'S is the holder of a valid class C liquor license with entertainment permit and dressing rooms which permits Plaintiff to operate in the TOWNSHIP OF VAN BUREN as a liquor license establishment and present topless performance dance entertainment activities.

2. That at all times relevant hereto, the Defendant, THE TOWNSHIP OF VAN BUREN (hereinafter referred to as "THE TOWNSHIP") was and is a duly authorized Michigan Township located within the County of Wayne, and State of Michigan. The TOWNSHIP is an entity amenable to suit pursuant to 42 U.S.C. 1983 et seq.

3. That jurisdiction is conferred upon this Court for resolution of the substantial constitutional questions presented herein, by virtue of 28 U.S.C. 1331 and 28 U.S.C. 1343(3), which provides, in pertinent part, that

the District Court shall have original jurisdiction over any civil action authorized by law to be commenced by any person to:

> Redress the depravations under color of any state law, statute, ordinance regulation, custom, or usage of any right, privilege, or immunity secured by the Constitution of the United States...

4. That the organic law which further authorizes the institution of this suit is founded on 42 U.S.C. 1983, which provides, in pertinent part, as follows:

> Every person who under color of any statute, ordinance, regulation, custom, usage of any state or territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to a depravation of any rights, privileges, immunities secured by the Constitution shall be liable to the party injured in an action at law or in equity or other proper proceedings for redress.

5. That Plaintiffs claims for attorneys fees and costs is founded upon 28 U.S.C. 1988.

6. That Plaintiffs claim for declaratory relief is founded upon Rule 57 of the Federal Rules of Civil Procedure, as well as 28 U.S.C. § 2201, which provides that:

> "... any Court of the United States upon filing of an appropriate pleading, may declare the rights and other legal relations of any other interested party seeking such declaration, whether or not further relief is or could be sought...."

7. That jurisdiction of this Court to grant injunctive relief is conferred upon this Court by virtue of 28 U.S.C. § 2202, which provides in pertinent part:

> "Further necessary or proper relief on a declaratory judgment or decree may be granted after reasonable notice and hearing against any adverse party whose rights have been determined by such judgment..."

8. That venue is proper within the Eastern District of Michigan as all parties reside or conduct business within this judicial district.

II. FACTUAL BACKGROUND

.9. That Plaintiff hereby re-alleges and re-affirms

paragraphs one through eight above as if fully stated herein , word by word , and paragraph by paragraph.

10. That on or about March 2, 1999, the TOWNSHIP OF VAN BUREN passed Ordinance No. 2-16-99, captioned "A Ordinance to Amend the Zoning Ordinance 6-2-92 as amended of the CHARTER TOWNSHIP OF VAN BUREN to revise regulations pertaining to sexually oriented businesses." This Ordinance seeks to unconstitutionally regulate the location of adult businesses; impose unconstitutional operating requirements upon adult businesses; unconstitutionally regulate the contents of advertising adult businesses; and impose criminal penalties for violation of Ordinances. Because Plaintiff was a prior non-conforming land use, Plaintiff only challenges Section 2-16-99 (e) which seeks to limit commercial speech by an adult business.

11. That on this same date, the " Township adopted Ordinance 2-16-99(3), titled "Sexually Oriented Businesses." This Ordinance unconstitutionally attempts to require licensure by TOWNSHIP of all adult businesses, impose unconstitutional criminal disabilities upon ownership of an adult business, impose unconstitutional basis's for denial, suspension and/or revocation of an adult license, impose unconstitutional inspectional requirements upon adult businesses, impose unconstitutional license transfer restrictions and impose criminal penalties for violation of the Ordinances.

12. That on this same date, the TOWNSHIP adopted Ordinance 2-16-99 (4) titled "Public Indecency". This

Ordinance attempts to unconstitutionally regulate public nudity within the TOWNSHIP and impose criminal penalties for violation of the Ordinance.

13. Similarly, on this same date, the TOWNSHIP passed Ordinance 2-16- 99(2) entitled "Nudity on a Licensed Premises". This Ordinance unconstitutionally attempts to prohibit nudity on a premise licensed by the Michigan Liquor Control Commission and provide criminal penalties for violation thereof.

14. That Ordinance 2-16-99 (e) states as follows:

> (e) Exterior Display and Signs (1.) a sexually oriented business is in violation of this section if: (a) the merchandise or activities of the establishment are visible from any point outside the establishment; or (b) the exterior portions of the establishment or signs have any words, lettering, photographs, silhouettes, drawings, or pictorial representations of any specified anatomical area or sexually explicit activities as defined in this ordinance.

15. That sexually explicit activities are defined in Section 4.49 of the Ordinances to include, the following:

(a) the fondling or other erotic touching of human genitals, pubic regions, buttocks, anus, or female breasts;

(b) sex acts normal or perverted, actual or **simulated,** including intercourse, oral copulation, or sodomy;

(c) masturbation, actual or **simulated**; or

(d) excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above;

(e) any activity intended to arouse, appeal to or gratify a persons lust, passions, or sexual desires.

16. That Ordinance 2-16-99 (1) requires that an adult business obtain a license to operate within the TOWNSHIP. Operation without a license is a misdemeanor (See 22-402).

17. That prior to the issuance of a license, the licensee is required to submit an application to the TOWNSHIP Clerk, who may accept the application or reject it, finding that it is incomplete. The TOWNSHIP Clerk has ten (10) days to review the license for

completeness. A "plan of operation" is required to be submitted with the application (See 22-403 (a) (b) (e)).

18. That in order to be granted a license to operate each shareholder which holds ten (10%) percent of the stock of a corporation, must sign the application and meet the conditions for issuance of a license (See 22-403 (c)).

19. That each applicant must attest to the truth and accuracy of all information provided on the application and agree to be personally liable to the TOWNSHIP for all legal fees incurred by the TOWNSHIP in any legal and/or administrative proceeding alleging a violation of the Ordinance (See 22-403 (f)).

20. That once the TOWNSHIP Clerk determines completeness of the application, the Clerk has fourteen (14) days to forward the application to two (2) of the three (3) full time elected TOWNSHIP officials. These officials have thirty (30) days to approve or deny the license from the date of its receipt (See 22-403 (g)).

21. That during the thirty (30) day review period written review shall be provided by the Chief of Police, Fire Department and Building Department who may, as part of the review process inspect the premises (See 22-403 (h)).

22. That a license to operate an adult business may be denied for any of the following reasons:

The following may constitute the basis for denial of a license to operate a sexually oriented business:

(1) An applicant is under eighteen (18) years of age.

(2) An applicant is overdue on his or her payment to the TOWNSHIP of taxes, fees, fines or penalties assessed against or imposed in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for the issuance of the license or has falsely answered a question or request for information on the application forms.

(4) An applicant has been convicted of a violation of a provision of this section, other than the offense of operating a sexually oriented business without a license, within two (2) years immediately proceeding the filing of the application. The fact that a conviction is being appealed shall have no consideration.

(5) The premises to be used for the sexually oriented business has not been approved by the Health Department, Fire Department or Building Official.

(6) The premise is not in compliance with applicable laws and ordinances.

(7) An applicant has owned, operated, or been employed in a sexually oriented business in a managerial position within the proceeding twelve (12) months and has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law abiding manner.

(8) An applicant has a record of conviction for an offense involving gambling, narcotics, prostitution, pandering, pornography, public indecency, sexual assault or any violation of any provision of this article within the proceeding two (2) years. The fact that a conviction is being appealed shall be of no consideration.

(9) The applicant is not in compliance with applicable zoning ordinances.

23. That a license may also be denied by the Chief of Police if the Chief of Police determines that the individual is presently unfit to operate a sexually oriented business due to the applicants overall criminal record, regardless of the date of any criminal conviction. In this regard, 22-403 (j) provides as follows:

> That a license may also be denied if the Chief of Police determines that the applicant is presently unfit to operate a sexually oriented business due to the applicants overall criminal record, regardless of the date of any criminal conviction. In determining present fitness or unfitness under this section, the Chief of Police shall consider the following factors:
>
> 1.The extent and nature of past criminal activity;
>
> 2.The age at the time of the commission of the crime;
>
> 3.The amount of time that has elapsed since the last illegal activity;

4. The conduct or work activity prior to and following illegal activity;

5. Evidence of any rehabilitation or rehabilitative effort while incarcerated or following release; and

6. Other evidence of present fitness, including letters of recommendation from prosecution law enforcement and correctional officers who prosecuted, arrested or has custodial responsibly for that person, the Sheriff and Chief of Police in the community where the applicant resides, and any other person in contact with the applicant. It is a responsibility of the applicant to the extent reasonably possible to secure and provide necessary and reliable evidence required to determine present fitness.

24. A license for operation of adult business expires one (1) year after it is issued (See 22-404 (a)).

25. Section 22-404 (b) provides procedures for renewal as follows:

A license under this article shall be entitled to a renewal of the license after the Township Police have completed a criminal record check of the Police Departments Record Bureau; except when the license has been suspended or revoked, upon presentation of the previous license or presentation of an affidavit as to it's loss or destruction to the Township Clerk, filing of a completed renewal form provided by the Township Clerk, payment of the non-refundable renewal fee as provided in subsection 22-404 (c); and review and approval of the renewal application by two (2) of the three (3) elected officials. Application for renewal must be made at least thirty (30) days prior to the expiration of the existing license to allow adequate time for review and decision by the Township.

26. That a license issued requires that the applicant or licensee to permit representatives of the Police Department, Health Department, Fire Department and Building Department to inspect the premises of a sexually oriented business for the purposes of insuring

compliance with the law prior to or at any time it is occupied or open for business (See 22-404 (d)).

27. That a license may be suspended by the TOWNSHIP pursuant to 22-405

(a). This Section states:

> (a) The Township shall suspend a license for a period of thirty (30) days or until compliance, if it determines that a licensee or an employee of a licensee has:
>
> > (1) Violated or is not in compliance with this Article;
> >
> > (2) Knowingly permitted alcohol consumption or engaged in excessive alcohol consumption on the premise of a sexually oriented business with the exception of an adult motel;

(3) Refused to allow inspection of the sexually oriented business premises as authorized by this Article;

(4) Knowingly permitted gambling by any person in a sexually oriented business;

(5) Demonstrated an inability to operate or manage a sexually oriented business in a peaceful and law abiding manner thus necessitating action by law enforcement officers;

(6) Allowed, authorized.

conducted or engaged in any criminal activity on the premise;

(7) Provided any false information to the Township on any initial or renewal application sheet.

28. That a license shall be revoked if the license is suspended two (2) times in any one (1) year (See 22-405 (b)).

29. That a license shall be revoked by the TOWNSHIP as follows: The Township shall revoke a license if t is determined that.

(1) a licensee gave false or misleading information in the materials submitted to the TOWNSHIP during the application or renewal process;

(2) a licensee or employee has allowed possession, use, or sale of a controlled substance on the premises;

(3) a licensee or employee has knowingly allowed

prostitution on the premises;

(4) a licensee or employee has knowingly operated a sexually oriented business during a period of time when the licensee's license was suspended;

(5) a licensee has been convicted of an offense listed in subsection 22-403 (i) (8) for which the time period required has not elapsed;

(6) on two (2) or more occasions within a twelve (12) month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in subsection 22-403 (1) (8) or subsection 22-106 (a) for which a conviction has been obtained and the person or persons were employees of the sexually oriented business at the time the offense was committed;

(7) a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation,

masturbation, or sexual contact to occur in or on the licensed premises;

(8) the plan of operation has changed or the premises were enlarged without approval of the TOWNSHIP.

30. That the sole appeal of any determination by the TOWNSHIP to deny, suspend or revoke a license as pursuant to MCL 7.101 (See 22-406). Assuming MCL means Michigan Compiled Laws, there is no such statute set forth within Michigan Compiled Laws corresponding to this Section.

31. That Ordinance No. 2-16-99 (4) acts as an Amendment to Section 58-206 of the Code of Ordinances of Van Buren Township. This Ordinance states as follows:

Sec. 58-206. Public indecency.

(a) For purposes of this section *nudity* means the showing of the human make or female genitals pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola, or the showing of the covered male

genitalia in a discernibly turgid state. For purposes of this section, nudity shall not include a woman's breast feeding of a baby whether, or not the nipple or areola is exposed during or incidental to the feeding.

(b) For purposes of this section, *public place* or *vehicle* means any of the streets, alleys, parks, boulevards, schools or other public property in the township, or any dance hall, rental hall, theatre, amusement park, liquor establishment, store, depot, place of public accommodation or other private property generally frequented by the public for the purposes of education, recreation, amusement, entertainment, sport, shopping or travel; or any vehicle for public transportation, owned or operated by government either directly or through a public corporation, or authority or owned or operated by any non- governmental agency for the use, enjoyment or transportation of the general public.

(c) A person who knowingly or intentionally, in a public place or vehicle:

(1) Engages in sexual intercourse;

(2) Engages in deviant sexual conduct;

(3) Appears in a state of nudity;

(4) Fondles the genitals of himself or another person; or has committed the crime of public indecency, which is a misdemeanor.

(d) Every person convicted of a violation of any provision of this section shall be punished as provided by section 1-13. Each act of violation and every day upon which any such violation shall occur shall constitute a

the statutes of the State of Michigan.

32. That Ordinance 2-16-99 (2) adds Ordinance 6-69 to the Van Buren Township Ordinances. This Ordinance states as follows:

Sec. 6-69. Nudity on Licensed Premises.

(1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

(2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:

(a) the whole or part of the

pubic region;

(b) the whole or part of the anus;

(c) the whole or part of the buttocks:

(d) the whole or part of the genitals;

(3) Every word, sentence, clause and provision of this section is hereby declared to be severable, and if any word, sentence, clause provision or part thereof is declared to be invalid by a court of competent jurisdiction, the remaining provisions shall not be affected.

(4) The provisions of any or all code sections or subparts thereof in conflict herewith are repealed only to the extent necessary to give this section full force and effect.

(5) The provisions of this section shall become effective upon its passage by the Van Buren Charter Township Board of Trustees and upon

publication in accordance with the Township Charter and the statutes of the State of Michigan.

33. That the Plaintiff has for many years been presenting what is commonly referred to as topless performance dance activities at it's premises and desires to continue to do so in the future.

34. Plaintiff presently holds all permits necessary from the Michigan Liquor Control Commission ("MLCC") to operate such a facility and has held such permits for many years, including a class C liquor license with a entertainment permit with dressing rooms. Plaintiff has in the past and desires in the future to present constitutionally protected performance dance activities including, topless and/or fully nude performance dance entertainment at it's facility.

35. That the TOWNSHIP has not objected to the licensure by the MLCC in any year in which the Plaintiff has received such license.

36. That Plaintiff has expended significant time, money and resources since the date of licensure in the operation, management, repair, advertising, and promotion of its business.

37. That Plaintiffs business is located in Wayne County, Michigan, a County in excess of 95,000 persons.

38. That the Defendant has threatened to and in fact has taken action to enforce each of the above named Ordinances against the Plaintiff

herein. That said action, both threatened and as undertaken has been taken under color of law and on behalf of the Defendant TOWNSHIP.

39. That the actions of the Defendant are intended to and in fact will impose a prior restraint on constitutionally protected activity, will have the effect of significantly chilling First Amendment activity, will make it economically impossible for Plaintiffs to remain in business and for entertainers to earn a living, will result in a loss of Plaintiffs employees, customers and entertainers rights to engage in constitutionally protected speech, to lawfully earn a living and will violate the free speech, free expression, free association, due process, equal protection and privacy rights created under the United Stales Constitution.

40. That the actions of the Defendant in passing the above references Ordinances are preempted by MCL 41.181 (4) and MCL 436.1916.

COUNT I
42 U.S.C. 1983

41. That Plaintiff hereby re-alleges and re-affirms paragraphs one through forty above as if fully stated herein, word by word, and paragraph by paragraph.

42. That the Plaintiff is a corporation engaged in interstate commerce within the TOWNSHIP OF VAN BUREN, County of Wayne, and State of Michigan.

43. That the above cited Ordinances are unconstitutional in whole and/or in part, alone and/or in combination with one another both facially and as applied and in violation of the First, Fourth, Fifth, Eighth and Fourteenth Amendment rights under the United States Constitution and Plaintiffs corollary rights under the Michigan Constitution including but not limited to, Plaintiffs rights as secured by Article 1 Section 5, Section 11, Section 16 and Section 17 in that:

(a) The acts as a prior restraint on constitutionally protected activities, contrary to the First and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Michigan Constitution.

(b) They fail to provide for the procedural guarantees required under Freedman v. Maryland 380 U.S., 51 (1965) and FW/PBS v. Dallas 483 U.S., 215 (1990).

(c) They violate the First and Fourteenth Amendments to the United States Constitution in that it fails to require prompt judicial review or require prompt determination of an

adverse determination by the approving authorities.

(d) They are not a content neutral law of general applicability but rather, is an impermissible content based restriction.

(e) They It is overbroad in it's application to constitutionally protected activities and it violates Renton v. Playtime Theatres 475 U.S., 41 in that it fails to offer a reasonable opportunity to open and operate an adult business.

(f) They violate Plaintiff's constitutional rights to free speech and it is not narrowly tailored and is overbroad in it's restrictions on constitutionally protected speech contrary to the First and Fourteenth Amendments to the United States Constitution and further violates Plaintiffs Fourteenth Amendment rights to engage in a lawful occupation and attempts to impose "unconstitutional conditions"in obtaining a license to engage in constitutionally protected

activities which in and of itself is a violation of the First and Fourteenth Amendments of the United States Constitution.

g) They violate the First and Fourteen Amendments of the United States Constitution in that it's restrictions on commercial speech do not further a substantial governmental interest, are not narrowly tailored to directly advance that interest, are not supported by any evidence that the restrictions would be effective in furthering any substantial governmental interest.

(h) They violate the First Amendment and the privacy rights found in the Penumbra of the Constitution by requiring disclosure of highly private and personal information in order to be able to engage in First Amendment protected activities.

(i) They violate the First Amendment right to engage in expressive activities anonymously by requiring disclosure of highly personal

information and ownership in order to be able to engage in such activities.

(j)They fail to provide constitutionally requisite *mens rea* in order to establish violations thereof and provides no ability to contest a violation which would result in a license denial, suspension and/or revocation.

(k) They violate Plaintiff's equal protections rights under the Fourteenth Amendment in that it unconstitutionally discriminates against adult businesses based upon the content of their speech and further, it creates and permits uneven treatment in the exercise of constitutionally protected rights in the State of Michigan by allowing standards to vary from county to county, city to city, township to township and therefore, permits differing treatment amongst individuals who desire to engage in constitutionally protected speech.

(l) They fail to further substantial governmental

interests and the Ordinance provisions are greater than essential to further those interests.

(m) They contain constitutionally impermissible reasons to deny, suspend or revoke a license.

(n) They violate the occupational liberty interests of the Plaintiff and its employees, as well as (entertainers, by impermissibly restricting occupational activities.

(o) They impermissibly single out the First Amendment Protected businesses from discriminatory business regulations.

(p) They violate the First Amendment rights of entertainers and patrons by placing such restrictions on conduct that it is impossible for them to clearly communicate with one another.

(q) The numerous provisions within the Ordinance sections themselves are vague including, the terms

deviant sexual conduct set forth in Ordinance No. 2-16-99 4 (c) the term sexual contact set forth in Ordinance No. 2-16-99 (3) the term "plan of operation" set forth in Ordinance 2-16-09 (4) the term "peaceful and law abiding manner" as set forth in Ordinance 2-16-99 (4) and the term "unfit" as set forth in Ordinance 2-16-99 (3).

(r) That the Ordinances, to the extent that they attempt to prohibit "simulated" sexual activities are, unconstitutional and in violation of the First and Fourteenth Amendments in that, they unduly restrict the content of speech and impair the communicative content of that speech.

(s) They violate the First and Fourteenth Amendments to the United States Constitution by placing restrictions on the contents of performance dance entertainment.

(t) They constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments.

(u) They violate the substantive and procedural due rights of Plaintiff and others similar situated

(v) They unconstitutionally impose strict liability upon licensees for a violation of criminal laws by an employee and results in the disenfranchising of a person's right to speak and express themselves.

(w) They contain regulations prohibiting dance entertainment which are overbroad and are in violation of the First and Fourteenth Amendments of the United States Constitution.

(x) They contain dance restriction requirements which violate the First and Fourteenth Amendments in that they impermissibly restrain dance activities and they impermissibly deny entertainers a right to a lawful living and further violate the right of lawful association protected under the First Amendment of the United States Constitution.

(y) The ordinances were not enacted upon a proper basis and are contrary to state law.

(z) The criminal disability provisions are unconstitutional and in violation of the First and Fourteenth Amendments.

(aa) The Ordinances are unconstitutional and they permit unbridled discretion to grant or deny a license.

(bb) The ordinances are unconstitutional in that they provide for inspections of licensed businesses which are unconstitutional and in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution.

(c) The Ordinances are unconstitutional in that they fail to provide for prompt judicial review.

(dd) The Ordinances attempt to shift the burden of paying for administrative/enforcement costs is unconstitutional and in violation of Plaintiff's constitutional rights as secured

by the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Michigan Constitution.

44. That any action taken by the TOWNSHIP to enforce the Ordinance against the Plaintiff herein will be taken under a color of law and will deprive Plaintiff of its constitutional rights as set forth herein and will cause irreparable harm to the Plaintiff for which damages are an adequate remedy as a mailer of law.

45. That Plaintiff has a substantial likelihood of success on the merits in regard to the constitutional claims; that the public interest weighs in favor of preventing depravation of constitutional rights; and that any balancing of harms between the parties weighs in favor of the Plaintiff and against the Defendant in its attempts to enforce a clearly and hopelessly flawed unconstitutional Ordinance.

46. That the actions of the TOWNSHIP in enforcing and in threatening to enforce this Ordinance have caused and will continue to cause, constitutional depravations and damages including, loss of profits, loss of good will, costs and attorney fees, and other damages yet to be discovered.

COUNT II
PREEMPTION UNDER STATE LAW

47. That Plaintiff hereby re-alleges and re-affirms

paragraphs one through forty-six above as if fully stated herein, word by word, and paragraph by paragraph.

48. That the Ordinances, in so far as they conflict with MCL 41.181 and 436.1916 (3), are preempted by state law and are therefore unenforceable.

49. That the Ordinances are in conflict with the Liquor Control Commissions constitutionally mandated complete control of the trafficking of alcoholic beverages within the State of Michigan and are therefore unconstitutional contrary to Article 4, Section 40 of the Michigan Constitution and are unenforceable.

COUNT III
ACTION FOR INJUNCTIVE RELIEF

50. That Plaintiff hereby re-alleges and re-affirms paragraphs one through forty-nine above as if fully stated herein, word by word, and paragraph by paragraph.

51. For the reasons set forth above, and to preclude Plaintiff from being denied its rights under the United States Constitution and its corollary rights under the Michigan Constitution, Plaintiff requests the following injunctive relief:

A. Enter an Order of this Court prohibiting Counter-Defendant, its employees,

agents, and representatives as well as all others who receive actual constructive notice from enforcing VAN BUREN TOWNSHIP Ordinances 2-16-99 (e), 2-16-99(3), 2-16-99(4), 2-15-99 (2);

B. Enter and Order of this Court compelling Defendant to take no action to enforce the aforementioned Ordinances against the Plaintiff herein;

C. Enter an Order granting further injunctive and/or equitable relief as this Court may deem just, fair and necessary under the circumstances.

COUNT IV
ACTION FOR DECLARATORY RELIEF

52. That Plaintiff hereby re-alleges and re-affirms paragraphs one through fifty-one above as if fully stated herein, word by word, and paragraph by paragraph.

53. That this Court has authority to declare the rights and other relations of the Plaintiff and the Defendant hereto.

54. That this Court should declare that the TOWNSHIPS Ordinances are unconstitutional and in violation of Plaintiffs First, Fifth,

Eighth and Fourteenth Amendment rights under the United States Constitution and the corollary rights under the Michigan Constitution.

55. That this Court should declare that the TOWNSHIP'S Ordinances are preempted by state law.

56. That this Court should declare that Plaintiff is not required to obtain a license from the TOWNSHIP to operate its business within the TOWNSHIP.

57. That this Court should declare that the Defendant's Ordinances are an unconstitutional prior restraint on constitutionally protected expression.

58. That this Court should declare that the TOWNSHIP'S Ordinances impose unconstitutional conditions in violation of the First and Fourteenth Amendments to the United States Constitution on businesses wishing to engage in constitutionally protected speech.

59. That this court should declare that the disability provisions within Ordinance 2-16-99 (3) are unconstitutional in that they prohibit licensee's entertainers and employees from engaging in speech protected by the First Amendment to the United States Constitution based upon prior violations of that Ordinance or law.

60. That this Court should declare that the TOWNSHIP'S Ordinance are unconstitutional in that it

unconstitutionally restricts Plaintiff, it's employees, customers and entertainers liberty rights to engage in a lawful occupation and/or to enjoy lawful entertainment.

61. That this Court should declare that the licensing Ordinances are unconstitutional in that it is not related to any legitimate governmental interest and it violates Plaintiff's equal protection rights under the Fourteenth Amendment.

62. That this Court should declare that the restrictions on commercial speech set forth in Ordinance 2-16-99 are unconstitutional in that they unduly prohibit Plaintiff's rights to engage in lawful commercial speech.

63. That this Court should declare that the Ordinances, as applied to Plaintiff herein is unconstitutional in its entirety, alone or in combination thereof, in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution.

64. That this Court should declare that the Ordinances alone and/or in combination are unconstitutional in that they fail to require prompt judicial review of any adverse licensing decision.

65. That the Court should declare that the Ordinances are unconstitutional and violative of Plaintiff's rights under the First Amendment to freely associate and/or engage in lawful occupation.

66. That this Court should declare that the disclosure requirements are unconstitutional and violate

Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

67. That this Court should declare that the Ordinances are unconstitutional as it lacks the Freedman procedural guarantees.

68. That this Court should declare that the Ordinances restrictions on expressive performance dance entertainment including, prohibiting "simulate sex" are unconstitutional and in violation of the First and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Michigan Constitution.

69. That this Court should declare that the Ordinances were not supported by evidence justify the restrictions on speech related activities and therefore are unconstitutional.

70. That this Court should declare that the Ordinances in whole or part violates various provisions of the United States Constitution, the Michigan Constitution and Michigan statutory law and are therefore unenforceable.

71. That this Court should declare that prohibitions on nudity are unconstitutionally overbroad and unduly restrictive and therefore unconstitutional.

72. That this Court should declare that the terms"sexual contact", "peaceful and law abiding manner", and "unfit" are vague, and are therefore, unconstitutional and enforceable

73. That this Court should declare that the inspection provisions set forth in Ordinance 2-16-99 (3) section 22-404 (d) are unconstitutional and in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Michigan Constitution.

74. That. this Court should declare that the Ordinances were passed in violation of Plaintiff's procedural and substantive dues process rights and have resulted in a taking of private property without just compensation.

75. That this Court should declare that Plaintiff is a prior nonconforming land use and does not need to comply with 2-16-99 (e).

76. That this Court should declare that the Ordinances are unconstitutional, contrary to the United States Constitution and the Michigan Constitution for some, all or part of the reasons set forth in paragraph 45 and are therefore unenforceable.

COUNT V
ACTION FOR ATTORNEY FEES

77. That Plaintiff hereby re-alleges and re-affirms paragraphs one through seventy-six above as if fully stated herein, word by word, and paragraph by paragraph.

78. That Plaintiff, as prevailing party in the aforementioned matter is entitled to recover actual attorney fees and costs pursuant to 42 U.S.C. 1988 in seeking to have the aforementioned Ordinances declared unconstitutional.

WHEREFORE, Plaintiff asks this Honorable Court to enter a judgment in favor of Plaintiff and against Defendant including:

A. A declaration that Ordinance No. 2-16-99 (e), 2-16-99 (2), 2-16-99 93) and 2-16-99(4) are unconstitutional both facially and as applied to Plaintiff herein and are in violation of First, Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Michigan Constitution.

B. A declaration that the Ordinances are preempted by state law.

C. Enter a preliminary and permanent injunction enjoining the Defendant, including its officers, agents, employees and representatives and all persons acting through or for them from enforcing upon or implementing Ordinance Nos. 2-16-99, 2-16-99 (2), 2-16-99 (3) and 2-16-99(4).

D. Award actual compensatory damages for Plaintiff's lost profits, loss of goodwill, diminution in value of property, and all other recoverable damages that this Court believes fair and just

E. Award Plaintiff its reasonable attorney fees and costs incurred herein pursuant to 42

U.S.C. 1988.

F. Enter such other relief in law and equity that this Court deems just and proper in the circumstances.

Respectfully submitted,

_____/s/_____
BRADLEY J. SHAFER (P36604)
Attorney for Plaintiff
3800 Capital City Blvd., #2
Lansing, Michigan 48906
517/886-6560

_____/s/_____
ALLAN S. RUBIN (P44420)
Co-Counsel for Plaintiff
24460 Telegraph Road
Southfield, Michigan 48034
248/35-1220

_____/s/_____
STEPHEN H. BOAK (P10912)
Sempliner, Thomas & Boak
Co-Counsel for Plaintiff
711 W. Ann Arbor Trail
Plymouth, Michigan 48170
313/455-4560

_____/s/_____
CORRETT E. O'MEARA (P54716)
Co-Counsel for Plaintiff
407 E. Fort Street
Detroit, Michigan 48226
313/399-5000

Dated: December 27, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE GARTER BELT, INC., a Michigan corporation, **d/b/a LEGG'S LOUNGE**,
Plaintiff,

v.

CHARTER TOWNSHIP OF VAN BUREN, a Michigan municipal corporation,
Defendant.

_____/

BRADLEY J. SHAFER (P36604)
Shafer & Associates, P.C.,
Co-Counsel for Plaintiff
3800 Capital City Blvd., #2
Lansing, Michigan 48906-210
517/886-6560

STEPHEN H. BOAK (P10912)
Sempliner, Thomas & Boad
Co-Counsel for Plaintiff
711 W. Ann Arbor Trail
Plymouth, MI 48170
734/455-4560

ALLAN S. RUBIN (P44420)
Rubin & Rubin, P.LL.C.,
Co-Counsel for Plaintiff
24460 Telegraph Road
Southfield, Michigan 48034
248/356-1220

PATRICK B. McCAULEY (P17297)
DAVID J. SZYMANSKI (P40734)
Sommers, Schwartz
Silver & Schwartz, P. C.
Attorneys for Defendant
2000 Town Center, Suite 900
Southfield, MI 48075
248/355-0300

CORBETT EDGE OMEARA (P54716)
Co-Counsel for Plaintiff
407 E. Fort Street, Suite 110
Detroit, Michigan 48226
313/399-5300

/

DEMAND FOR TRIAL BY JURY

NOW COMES Plaintiff, by and through ifs attorneys, *RUBIN & RUBIN, P.LL.C.* and herewith demands a trial by jury of the above-entitled cause.

Respectfully submitted,

/s/

BRADLEY J. SHAFER (P36604)
Attorney for Plaintiff
3800 Capital City Blvd., #2
Lansing, Michigan 48906
517/886-6560

/s/

ALLAN S. RUBIN (P4442O)
Co-Counsel for Plaintiff
24460 Telegraph Road
Southfield, Michigan 48034
248/35-1220

_____/s/_____
STEPHEN H. BOAK (P10912)
Sempliner, Thomas & Boak
Co-Counsel for Plaintiff
711 W. Ann Arbor Trail
Plymouth, Michigan 48170
313/455-4560

_____/s/_____
CORRETT E. O'MEARA (P54716)
Co-Counsel for Plaintiff
407 E. Fort Street
Detroit, Michigan 48226
313/399-5000

Dated: December 27, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE GARTER BELT, INC., a Michigan Corporation, d/b/a Legg's Lounge,
Plaintiff,

v.

CHARTER TOWNSHIP OF VAN BUREN, a Michigan Municipal Corporation,
Defendant.

_____/

BRADLEY J. SHAFER (P36604)
Shafer & Associates, P.C.,
Attorneys for Plaintiff
3800 Capital City Blvd., #2
Lansing, Michigan 48906-210
(517)886-6560

ALLAN S. RUBIN (P44420)
Rubin & Rubin, P.L.L.C.,
Attorneys for Plaintiff
24460 Telegraph Road
Southfield, Michigan 48034
(248)356-1220

PATRICK B. McCAULEY (P17297)
DAVID J. SZYMANSKI (P40734)
Sommers, Schwartz
Silver & Schwartz, P. C.
Attorneys for Defendant
2000 Town Center, Suite 900
Southfield, MI 48075
(248)355-0300

STEPHEN H. BOAK (P10912)
Sempliner, Thomas & Boak
Attorneys for Plaintiff
711 W. Ann Arbor Trail
Plymouth, Ml 48170
(734)455-4560

CORBETT EDGE OMEARA (P54716)
Attorney for Plaintiff
407 E. Fort Street, Suite 110
Detroit, Michigan 48226
(313)399-5300

DEFENDANT'S MOTION REQUESTING ABSTENTION

NOW COMES Defendant Charter Township of Van Buren, by and through its attorneys Sommers, Schwartz, Silver & Schwartz, P.C., and, for its Motion for Abstention in the above captioned matter, states as follows:

1. There presently exists two actions involving precisely the same parties and the very same subject matter—local ordinances of the Defendant Township that regulate so-called sexually oriented businesses. (SOBs)

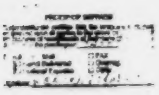
2. The initial action was filed by the Defendant Township (Plaintiff in that case) in Wayne County Circuit Court, was removed to this Court and was remanded by this Court *sua sponte* back to Wayne County Circuit Court due to a lack of subject matter jurisdiction.

3. Prior to this Court remanding the state court case to Wayne County Circuit Court, the Plaintiff here filed the instant action seeking injunctive and declaratory relief based on allegations that the ordinance in question in the state court action, as well as the other SOB ordinances enacted concurrent with that ordinance, are constitutionally defective.

4. On February 1, 2001, an Order Regarding Reassignment of Companion Case and Transfer to Detroit Office reassigned this injunctive /declaratory action to this Court based on LR 83.11.

5. For reasons discussed in the accompanying Brief, this Court is asked to abstain from involvement in the instant cause of action and to dismiss it.

WHEREFORE, the Defendant respectfully requests that this Honorable Court enter its Order: a) abstaining from involvement in this cause of action; and b) dismissing this cause of action.



SOMMERS, SCHWARTZ
SILVER & SCHWARTZ, P.C.

By:_____/s/_____
David J. Szymanski (P40734)
Attorneys for Defendant
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

Date: February 22, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHER DIVISION

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation
Plaintiff,

Case No.00-CV-75395
vs. HON. GEORGE CARAM STEEH

THE GARTER BELT, INC.,
a Michigan corporation d/b/a
LEGG'S LOUNGE,
Defendant.
_____/

ORDER REMANDING CASE TO WAYNE COUNTY CIRCUIT COURT FOR LACK OF SUBJECT JURISDICTION, AND DENYING PLAINTIFF'S MOTION TO REMAND AS MOOT

Defendant The Garter Belt , Inc. was ordered on December 19, 2000 to show cause why this case should not be remanded to the Wayne County Circuit Court for lack of federal subject matter jurisdiction. Plaintiff Charter Township of Van Buren seeks injunctive relief to enforce Township Ordinance Section 6069 prohibiting a nude person from frequenting, loitering, working for or performing in any establishment regulated by the Michigan Liquor Control Commission, and further prohibiting a proprietor or operator of such an establishment from allowing such conduct. Defendant removed the one count complaint from state court on December 13, 2000 invoking federal question jurisdiction under 28 U.S.C. §§ 1331 and 1441, and civil rights jurisdiction under 28 U.S.C. § 1443.

As explained in the order to show cause, federal question jurisdiction arises under 28 U.S.C. § 1331 and 28 U.S.C. § 1441 only when a federal question is presented on the face of the plaintiff's complaint. See Berlin Charter Township v. Proud, No. 95-CV-73561, 1995 WL 871011, *1(E.D. Mich. Sep. 13, 1995)(J. Zatkoff) (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987)). Conversely, defenses arising under federal law do not ordinarily confer federal jurisdiction. Id. (citing Caterpillar Inc., 482 U.S. at 393). Here, analogous to the situation in Proud, Township seeks injunctive relief to enforce a Township ordinance regulating adult entertainment. Township's claims are not removable, even though federal questions may be implicated, because the nature of the claims is to enforce the Ordinance under state law. Id. at *2 See also Township of Greenwich v. Mobile Oil Co., 504 F. Supp. 1275, 1277-1278 (D.N.J. 1981). Defendant's attempts to distinguish Proud and Township Greenwich are not persuasive. To the extent the First Amendment is implicated as a defense, such a defense does not give rise to federal jurisdiction. Proud, 1995 WL 871011 at *1. Township has not plead a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.[1] Contrary to defendant's argument, "[s]exual discrimination is speech and in employment" is not "an essential element" of Township's claim for injunctive relief, but in fact a defense to the claim.

Removal under 28 U.S.C. § 1443 is limited to cases

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1. Title VII applies to claims of unlawful employment discrimination. Even to the extent Title VII could possible apply here, at best, the federal statute is raised only by defendant as a possible defense i.e. that the Ordinance forces defendant to engage in discriminatory employment practices by requiring defendant to hire only male dancers to perform "topless".

involving enforcement of equal rights with respect to racial equality. Appalachian Volunteers, Inc v. Clark, 432 F.2d 530, 534 (6th Cir. 1970). Defendant has not come forward to demonstrate that Township's claims involve a denial of equal rights based on race. The court need not address the remaining issue of the timing of the removal.

Defendant has failed to show cause why this action should not be remanded to the Wayne County Circuit Court for lack of subject matter jurisdiction. Accordingly,

IT IS ORDERED that this matter is hereby REMANDED to the Wayne County Circuit Court. Plaintiff Charter Township of Van Buren's motion for remand is hereby DENIED AS MOOT.

SO ORDERED.

GEORGE CARAM STEEH
United States District Judge

Dated: 18 JAN 2001
Detroit, Michigan.

/S/
GEORGE CARAM STEEH
United States District Judge

NOT RECOMMENDED FOR FULL TEXT

File June 6, 2003 Clerks Office U.S. District Court

PUBLICATION

No. 01-2093

FILED JUNE 2 2003 LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GARTER BELT, INC., Plaintiff-Appellant,	)
v.	) **ON APPEAL FROM THE**
	) **UNITED STATES**
	) **DISTRICT**
	) **COURT FOR THE**
VAN BUREN TOWNSHIP, Defendant- Appellee.	) **EASTERN DISTRICT OF**
	) **MICHIGAN**
	) **OPINION** Judge Steeh

Before: DAUGHTREY and GIBBONS, Circuit Judges; and MILLS, District Judge*.

JULIA SMITH GIBBONS, Circuit Judge. Plaintiff-appellant Garter Belt, Inc. filed suit challenging the validity of ordinances enacted by defendant-appellee Van

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* The Honorable Richard H. Mills, United States District Judge for the Central District of Illinois, sitting by designation.

INFORMATION COPY
MANDATE NOT YET ISSUED
DIS. CT.# 00-75630

Buren Township regulating sexually-oriented businesses. Van Buren moved to dismiss, arguing that the district court should abstain from hearing this action in deference to a prior pending action brought by Van Buren against Garter Belt in Michigan state court, which seeks to require Garter Belt Inc. comply with one of the ordinances regulating sexually oriented businesses at issue in the federal court case. The district court granted Van Buren's motion to dismiss, finding abstention to be appropriate in light of the pending state proceeding, the important state interests, the ability of Garter Belt to raise all of its state and federal claims in the state proceeding, and the possibility that resolution of state issues in the pending state proceeding would render federal constitutional rulings unnecessary. Garter Belt now appeals. For the following reasons, we affirm the judgment of the district court.

I.

On November 6,2000, Van Buren, a Michigan municipal corporation, filed a complaint in Wayne County Circuit Court (*Garter Belt I*) seeking an injunction requiring Garter Belt,. the operator of a business establishment known as "Legg's Lounge," to comply with Ordinance 02-16-99(2). The ordinance, adopted by Van Buren on March 11, 1999, states in part:

> No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

On November 29, 2000, Garter Belt raised several affirmative defenses. In particular, Garter Belt argued that the ordinance was preempted by state law and deprived it's rights of equal protection, due process, and free speech, in violation of the Michigan Constitution.

On December 13, 2000, Garter Belt filed a notice of removal of *Garter Belt I* to the United States District Court for the Eastern District of Michigan. The district court remanded *Garter Belt I* to Wayne County Circuit Court for lack of subject matter jurisdiction, explaining that Van Buren's "claims are not removable, even though federal questions may be implicated, because the nature of the claims is to enforce the Ordinance under state law."

On December 28, 2000, Garter Belt filed the instant action in the United States District Court for the Eastern District of Michigan (*Garter Belt II*), challenging Van Buren's "regulations pertaining to sexually oriented businesses"- specifically, the validity of Ordinances No.2-16-99(e), (2), (3) and (4). Garter Belt sought to obtain damages under 42 U.S.C. § 1983, and asserted in its complaint that: 1) the "Ordinances are unconstitutional in whole and/or in part, alone and/or in combination with one another both facially and as applied and in violation of the First. Fourth, Fifth, Eighth and Fourteenth Amendment rights under the United States Constitution"; 2) "the Ordinances ... are preempted by state law" concerning liquor control; 3) Garter Belt was being denied its rights under the United States Constitution and its corollary rights under the Michigan Constitution"; and 4) Garter Belt's activities were "a prior nonconforming land use" not subject to the ordinances. Garter Belt sought declaratory and injunctive relief, including an order enjoining Van Buren from

enforcing the ordinances against it.

On January 18,2001, Van Buren raised the doctrine of abstention as an affirmative defense, and on February 22, 2001. Van Buren filed a brief in support of its motion for abstention. On June 28. 2001 the district court granted Van Buren's motion and dismissed the case without prejudice. The district court explained that:

> *Younger* abstention is appropriate here in that the state proceeding in *Garter Belt I* is currently pending, the enforcement of Township Ordinance 2-16-99(2) in *Garter Belt* I involves an important state interest, and *Garter Belt I* affords plaintiff Garter Belt an adequate opportunity to raise all of its claims, both state and federal. Abstention is also appropriate considering that resolution of the state issues in *Garter Belt I* may make federal constitutional rulings unnecessary.

On July 9, 2001, Garter Belt filed a motion to alter, amend, reconsider or vacate the judgment In its motion, Garter Belt argued that:

> By way of its opinion and Judgment, the Court dismissed this action in us entirety on the basis of *Younger* abstention predicated upon the on-going state court proceeding to enforce the provisions of Van Buren Township Ordinance 2-16-99(2). Nowhere in this Court's opinion, however, did it address the Plaintiffs challenges hero to Township Ordinances 2-1 6-99(c) [zoning], 2-16-99(3) [licensing], and 2-16-99(4) [public indecency].

As previously described, Van Buren filed *Garter Belt I* in state court, seeking an injunction requiring Garter Belt to comply with Ordinance 02-16-99(2). Garter Belt removed *Garter Belt I* to the district court, which subsequently remanded the case to state court. Garter Belt then filed this action challenging Ordinance 02-16-99(2). as well as Ordinances 2-16-99(e), (3) arid (4). Garter Belt I is pending in state court, satisfying the first *Younger* requirement.[1] Second, as the district court explained, *Garter Belt I* implicates "the state's important interest in enforcing its state and local liquor licensing and obscenity codes" *See Cooper*, 203 F.3d at 954 (observing that "the state has an important interest in.. . . prohibiting ... illegal obscene live performances") (internal quotation omitted); *Colonial First Properties, LLC v. Henrico County Virginia*, 236 F. Supp. 2d 588, 601 (ED. Va. 2002) ("regulating the distribution of alcohol is an important state interest"); *Jack& Lou's Inc. v. County of Cook*, 1994 WL 91963, at *2 (ND. III. 1994)

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1. The entry of an order permanently enjoining Garter Belt from violating Ordinance No. 02.16-99(2) by the state court in *Garter Belt I* on December 11, 2001 does not change the analysis. In its reply brief, Garter Belt states that it "has appealed that decision to the Michigan Appellate Courts." The Supreme Court has explained that "[v]irtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings .just as surely as they would if such intervention occurred at or before trial." *Huffman v Pursue, Ltd.* 420 U.S. 592, 608(1975); sec also *Zalman v Armstrong*, 802 F.2d 199, 204 (6th Cir. 1986) (" the proper time of reference for determining the applicability of Younger abstention is the time that the federal complaint is filed."

("State and local governing bodies have a recognized, important interest in regulating the sale of liquor.") (citing *World Famous* 99, 204 (6th dr. 986) (`the proper time of Drinking Emporium City of Tempe. 820 F2d 1079, 1082 (9th Cir. 1987)). Finally, Garter Belt has an adequate opportunity to raise all of its claims in the state court proceeding. Michigan Court Rule 2.203(B) provides that a "pleader may join as either independent or alternate claims as many claims. legal or equitable, as the pleader has against an opposing party."[2] As in *Carroll*, Garter Belt "may raise all of [its] claims- state, federal, and constitutional- under the state court's general and concurrent jurisdiction." *Carroll*, 139 F.3d at 1075, By deciding to abstain, the district court thus "avoided duplication of legal proceedings, deferred to the state's sovereignty over its law, and respected the principles of comity inherent to our federalism." *Id.*

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2 Joinder of Garter Belt's state law challenges to Ordinances 2-16-99(e), (3) and (4) may even be mandatory. Michigan Court Rule 2.203(A) states, in relevant part, that "[i]n a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against the opposing party at the time of serving the pleading, if it *arises out of the same transaction and occurrence* that his the subject matter of the action." (emphasis added.). Garter Belt acknowledged this possibility in proceedings before the district court on May 3, 2001 where it suggested that it"would have to join our claims in the state court proceedings." The stare court has not adjudicated this issue, In any event, a determination of the applicability of MCR 2.203(A) is not necessary to the resolution of this appeal, since the existence of an "opportunity to raise constitutional claims" is all that is required.

In its brief, Garter Belt points out that although "a state action is pending as it relates to this Township's attempt to enforce Ordinance 2-16-99(2), nudity on a licensed premises, it is undisputed that no similar action has been filed by the Defendant-Appellee to enforce the remaining ordinances against Plaintiff-Appellee." Garter Belt then argues that the Younger requirements have not been met. since no state action is pending as to Ordinances 2-16-99(c). (3) and (4), no state interests have been implicated with respect to these ordinances, and Garter Belt has not been afforded the opportunity to litigate constitutional claims as to these ordinances. This argument lacks merit. As this court explained in *Carroll*:

> When a person is the target of an ongoing state action involving important state interests, the state defendant cannot interfere with the pending state action by maintaining a parallel federal action involving *claims that could have been raised* in the state case. If the state defendant files such a case, *Younger* abstention requires the federal court to defer to the state proceeding.

Carroll, 139 F.3d at 1074-75 (emphasis added). This is precisely the situation presented here, Garter Belt, the defendant in a pending state proceeding involving the enforcement of state and local liquor licensing and obscenity codes, can not maintain this federal action involving claims that could have been brought "under the state court's general and concurrent jurisdiction." *Id.* at 1075. Garter Belt's repeated insistence that claims based upon Ordinances 2-16-99(c). (3) and (4) have not actually been raised in *Garter Belt I* misses the point. *Carroll* recognizes that abstention nevertheless is required because these claims

could have been raised.

Garter Belt advances several additional arguments against abstention. Quoting *Houston v. Hill*, 482 U.S. 451, 467-68 (1987), Garter Belt argues that abstention is "inappropriate for cases [where]...statutes are justifiably attacked on their face as abridging free expression." However, Garter Belt neglects to mention that the *Houston* court also added that "[i]n cases involving a facial challenge to a statute, the pivotal question in determining whether abstention is appropriate is whether the statute is fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Houston*, 482 U.S. at 468 (quoting *Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965)). In this case, Ordinances 2-16-99(2) arid (4) state that "[e]very word, sentence, clause and provision of this section is hereby declared to be severable," Since the challenged ordinances could "be limited by severing discrete unconstitutional subsections from the rest," abstention is proper. *See id.* In addition, in the state action Garter Belt claims that Ordinance 2-16-99(2) is preempted by MCL §41.181 and MCL §436.1916. while in this case Garter Belt similarly asserts that all of the ordinances "are preempted by state law." As a result a determination by the state court that Ordinance 2-16-99(2) does not apply to Garter Belt also may "render unnecessary or substantially modify the federal constitutional question."

Citing *Gwynedd Properties Inc. v. Lower Gwynedd Twp.*, 970 F.2d 1195, 1200-01 (3d Cir. 1992). Garter Belt also argues that the existence of parallel state proceedings does not implicate *Younger* where a federal action does not seek to enjoin those pending state proceedings." This argument has no application to the present situation, since Garter Belt specifically requested injunctive relief.

Applicable Sixth Circuit precedent also directly contradicts this proposition. As this court noted in *Carroll*, `the federal plaintiff does not have to seek injunctive relief against an on going state proceeding for a federal court to abstain. Younger abstention also applies in federal declaratory judgment actions because they invoke precisely the same interference with and disruption of state proceedings' as an injunction." *Carroll*, 139 F. 3d at 1074 (quoting *Samuels v. Mackell*, 401 U.S. 66, 72(1971)). Moreover, in *Gwynedd Properties* the Third Circuit noted that "abstention under Younger presumes that the federal action would interfere with the ongoing state proceedings since, typically, the federal plaintiff's object in filing the federal action is either to seek an injunction against the state proceedings themselves or to challenge the law being applied in those proceedings." 970 F.2d at 1200-01 (emphasis added). Here, Garter Belt challenges the constitutionality of the same ordinance that Van Buren seeks to enforce in *Garter Belt I*. Since "there is a nexus between the claims asserted in the federal action and the defenses or claims asserted or available in the state action." abstention thus is appropriate. *Id.* at 1201.

III.

For the foregoing reasons, we affirm the district court's judgment dismissing this action.

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF VAN BUREN,
A Michigan municipal corporation,
Plaintiffs/Counter Defendants

vs.

THE GARTER BELT, INC., A Michigan corporation, d/b/a LEGG'S LOUNGE
Defendants/Counter Plaintiffs.
_____/

Patrick B. McCauley (P 17297)
David J. Szymanski (P40734)
Sommers, Schwartz, Silver & Schwartz, PC.
Attorneys for Plaintiff Counter-Defendant
2000 Town Center, Suite 900
Southfield, Michigan 48075
248/355-0300

Bradley J. Shafer (P36604)
Shafer & Associates, PC.
Attorney for Defendant/Counter-Plaintiff
5171886-6560

Allan S. Rubin (P44420)
Rubin & Rubin, PLLC
Co-Counsel for Defendant/Counter-Plaintiff
24460 Telegraph Road
Southfield, Michigan 48034
248/356-1220

JUDGMENT AND PERMANENT INJUNCTION

At a session of said Court held in the City of

Detroit, County of Wayne,
State of Michigan, on DEC 11 2001

PRESENT: HON. JOHN D O'HAIR
Circuit Court Judge

This matter having come before the Court on November 30, 2001 upon the Motion for Summary Disposition of the Plaintiff and Counter-Defendant, the Court having considered the briefs of the parties, heard argument, being otherwise fully advised in the premises and for the reasons set forth on the record;

IT IS HEREBY ORDERED that Plaintiff and Counter-Defendant Charter Township of Van Buren hereby has a judgment in its favor based on the Court finding that the ordinance in question is without constitutional or legal infirmity and that the Court has the statutory authority to abate a nuisance, which it has done in this action.

IT IS HEREBY FURTHER ORDERED that Defendant and Counter-Plaintiff The Garter Belt, Inc. d/b/a Legg's Lounge hereby is permanently enjoined from violating in any manner or form the Charter Township of Van Buren' s ordinance entitled Nudity on Licensed Premises, Ordinance No. 02-16-99(2), adopted March 11, 1999.

IT IS HEREBY FURTHER ORDERED that, for the reasons stated fully on the record, the Plaintiff and Counter-Defendant's Motion for Summary Disposition is granted, and the counterclaims of the Defendant and Counter-Plaintiff are dismissed with prejudice.

IT IS HEREBY FURTHER ORDERED that action to enforce this judgment is stayed for a period is entered This Judgment resolves the last pending claim and closes the case.

JOHN D. O' HAIR
Circuit Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMANTHA BATES
Plaintiff,

v.

File No. **02-73692**
Hon. **PATRICK J. DUGAN**
MAGISTRATE JUDGE
VIRGINIA M. MORGAN

TOWNSHIP OF VAN BUREN,
a Municipal Corporation
Defendant.

/

Michael L. Donaldson (P35780)
Attorney for Plaintiff
31564 Schoolcraft
Livonia, MI 48150
(734) 261-8140

/

COMPLAINT FOR DECLARATORY JUDGMENT, VIOLATION OF CIVIL RIGHTS, PERMANENT INJUNCTION AND ATTORNEY FEES

NOW COMES Plaintiff, Samantha Bates, by and through her attorney, Michael L. Donaldson, and for her cause of action and others similarly situated says:

PARTIES AND JURISDICTION

1. Plaintiff is a resident of Livingston County, State of Michigan.

2. Defendant, Township of Van Buren, [hereinafter "Township"]County of Wayne, State of Michigan, is a Charter Township and corporate body, pursuant to MCL 42.1, et seq; MSA 5.46(1), et seq.

3. Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1331 and 28 U.S.C. 1343(3) for violation of the First and Fourteenth Amendments of the United States Constitution. Further jurisdiction is vested pursuant to 42 U.S.C. 1983.

4. Plaintiff's claim to attorney fees is based on 28 U.S.C. 1988.

5. Jurisdiction of this Court to grant injunctive relief is based on 28 U.S.C. § 2202.

6. Venue is proper for the Eastern District of Michigan as all parties reside or conduct business within this judicial district.

COMMON AVERMENTS

7. Plaintiff incorporates by reference paragraphs 1 through 6 of this complaint as if fully set forth herein.

8. On or about March, 1999, the Township amended its Code of Ordinances, adopting Ordinance No. 2-16-99(2) § 6-69, entitled Nudity on Licensed Premises which, in Subsection (1), provides:

(1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

(2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:

(a) the whole or part of the pubic region;
(b) the whole or part of the anus;
(c) the whole or part of the buttocks;
(d) the whole or part of the genitals;
(e) the breast area including nipple, or more than one half of the area of the breast.

(3) Every word, sentence, clause and provision of this section is hereby declared to be severable, and if any word, sentence, cause provision or part thereof is declared to be invalid by a

court of competent jurisdiction, the remaining provisions shall not be affected.

(4) The provisions of any or all code sections or subparts thereof in conflict herewith are repealed only to the extent necessary to give this section full force and effect.

(5) The provisions of this section shall become effective upon its passage by the Van Buren Charter Township Board of Trustees and upon publication in accordance with the Township Charter and the statutes of the State of Michigan.

9. Township Ordinance, Article 3 § 22-106, et al requires a license to be issued to each owner of an establishment offering adult entertainment and to possess a valid entertainer's permit and requires each dancer to obtain an entertainer's permit. It states:

(a) It shall be unlawful for any owner, his agent or employee, of any theater or establishment offering any kind of show emphasizing specified sexual activities or specified anatomical areas to employ any person as a dancer or entertainer unless such person possesses a valid entertainer's permit

issued by the township.

(b) It shall be unlawful for any person to provide his or her services as a dancer or entertainer in any theater or establishment offering any kind of show emphasizing specified sexual activities or specified anatomical areas, unless such person possesses at the place of employment, a valid entertainer's permit issued by the township.

10. Township Ordinance Article 3 § 22-107 requires that the dancer must provide the Township with full name and present address, plus two previous addresses, plus a description of the type of dancing, the name and mailing address of all prospective employers, written proof of age, a physical description, a photograph, a criminal history and such other identification and information as necessary "to discover the truth of the matters specified in this section" and it must be signed under oath. The Township clerk determines the completeness of the application. Further, the ordinance requires the dancer, at the time of the application for a permit, to pay a "non-refundable application fee", the amount of which fee is not stated. However, the license itself is $150.00.

11. Township Ordinance Article 3 § 22-108 vests authority for the issuance of the entertainer's permit in the Township clerk. The application

will not be honored until Township police have completed a criminal record check and a conviction involving "gambling, narcotics, prostitution, pandering or pornography, or a violation of any provision of this Article within the preceding two years will constitute grounds for refusal to issue or renew an entertainer's permit."

12. Under the foregoing ordinances, the Township clerk, in his or her discretion, decides whether an application is complete and satisfactory, thereby causing the license to be denied.

13. The license, issued under the foregoing provisions, expires within one year.

14. Township Ordinance Article 3 § 22-106 through 22-112 has no appeal mechanism for suspension or denial of license.

15. That Plaintiff is a 26-year-old single mother of a nearly 3-year-old child. She is a high school graduate with 3 years of nursing who is nearing completion of a medical transcription course. In addition to her educational pursuits, Plaintiff is an independent contract dancer that rents space from The Garter Belt, Inc. in the Township of Van Buren and has so performed for approximately 3 years.

16. Plaintiff has expended significant time, money and resources in costuming, et al, to appear as an exotic adult dancer and the actions of the Township are intended to and do, in fact,

impose prior restraint on a constitutionally protected activity and have a chilling effect on Plaintiff's ability to continue to dance and earn a living.

17. In the latter part of 2000, the Township of Van Buren sought to enforce the aforestated Nudity on Licensed Premises ordinance, which enforcement, as stated, substantially impairs Plaintiff's and the other dancers' income and unconstitutionally interferes with her and the other dancers' freedom of expression.

COUNT I - 1983

18. Plaintiff incorporates by reference paragraphs 1 through 17 of this complaint as if fully set forth herein.

19. The above cited ordinances, in whole and/or in part, alone or in combination with one another, facially and as applied, violate the First, Fourth, Eighth and Fourteenth Amendments, and:

(a) Acts as a prior restraint on constitutionally protected activities, contrary to the First and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Michigan Constitution.

(b) Fail to provide for the procedural guarantees required

under Freedman v. Maryland 380 U.S. 51 (1965) and FW/PBS v. Dallas 483 U.S. 215 (1990).

(c) Violate the First and Fourteenth Amendments to the United States Constitution in that it fails to require prompt judicial review or require prompt determination of an adverse determination by the approving authorities.

(d) Are not a content neutral law of general applicability but rather, is an impermissible content based restriction.

(e) Are overbroad in the application to constitutionally protected activities and violate Benton v. Playtime Theatres, 475 U.S. 41 in that they fail to offer a reasonable opportunity to open and operate an adult business.

(f) Violate Plaintiffs constitutional rights to free speech and they are not narrowly tailored and are overbroad in their restrictions on constitutionally protected speech contrary to the First and Fourteenth

Amendments to the United States Constitution and further violate Plaintiff's Fourteenth Amendment rights to engage in a lawful occupation and attempt to impose "unconstitutional conditions" in obtaining a license to engage in constitutionally protected activities which in and of itself is a violation of the First and Fourteenth Amendments of the United States Constitution.

(g) Violate the First and Fourteen Amendments of the United States Constitution in that their restrictions on commercial speech do not further a substantial governmental interest, are not narrowly tailored to directly advance that interest, are not supported by any evidence that the restrictions would be effective in furthering any substantial governmental interest.

(h) Violate the First Amendment and the privacy rights by requiring disclosure of highly private and personal information in order to be able to engage in First Amendment protected activities.

(i) Violate the First Amendment right to engage in expressive activities anonymously by requiring disclosure of highly personal information and ownership in order to be able to engage in such activities.

(j) Fail to provide constitutionally requisite *mens rea* in order to establish violations thereof and provide no ability to contest a violation which would result in a license denial, suspension and/or revocation.

(k) Violate Plaintiff's equal protection rights under the Fourteenth Amendment in that it unconstitutionally discriminates and creates and permits uneven treatment in the exercise of constitutionally protected rights in the State of Michigan by allowing standards to vary from county to county, city to city, township to township and therefore, permits differing treatment amongst individuals who desire to engage in constitutionally protected speech.

(l) Fail to further substantial governmental interests and the

Ordinance provision are greater than essential to further those interests.

(m) Contain constitutionally impermissible reasons to deny, suspend or revoke a license.

(n) Violate the occupational liberty interests of the Plaintiff by impermissibly restricting occupational activities.

(o) Impermissibly single out the First Amendment protected businesses from discriminatory business regulations.

(p) Violate the First Amendment rights of entertainers and patrons by placing such restrictions on conduct that it is impossible for them to clearly communicate with one another.

(q) Are vague and to the extent they attempt to prohibit "simulated" sexual activities are unconstitutional and in violation of the First and Fourteenth Amendments in that they unduly restrict the content of speech and impair the communicative content of that speech.

(r) Violate the First and Fourteenth Amendments to the United States Constitution by placing restrictions on the contents of performance dance entertainment.

(s) Constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments.

(t) Violate the substantive and procedural due process rights of Plaintiff and others similarly situated.

(u) Contain regulations prohibiting dance entertainment which are overbroad and are in violation of the First and Fourteenth Amendments of the United States Constitution.

(v) Contain dance restriction requirements which violate the First and Fourteenth Amendments in that they impermissibly restrain dance activities and they impermissibly deny entertainers a right to a lawful living and further violate the right of lawful association protected under the First

Amendment of the United States Constitution.

(w) Were not enacted upon a proper basis and are contrary to state law.

(x) The criminal disability provisions are unconstitutional and in violation of the First and Fourteenth Amendments.

(y) Permit overly broad discretion in township officials to grant or deny a license and/or suspend same.

(z) Are unconstitutional in that they provide for inspection of licensed business, which are unconstitutional and in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution.

(aa) Are unconstitutional in that they fail to provide for prompt judicial review.

(bb) Attempt to shift the burden of paying for administrative/enforcement costs, which is unconstitutional and in violation of Plaintiff's constitutional rights as secured

by the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Michigan Constitution.

20. That Township officials, including police officers, seeking to enforce the ordinance against Plaintiff and others similarly situated, acting under color of law, have threatened Plaintiff with citation and/or arrest for violation of the ordinance and deprive Plaintiff of her constitutional rights, causing her irreparable harm and loss of income and other monetary damages.

21. At all times mentioned herein, since the ordinance was adopted, no procedure has been developed by Township for the licensing of either The Garter Belt, Inc. or of Plaintiff, although inquiries have been made to obtain such license. Despite the absence of license procedures, Township officials, including police officers, have attempted to enforce the above named ordinances and have sent Township officials and private detectives into The Garter Belt, Inc. to photograph or videotape Plaintiff dancing, under threat of prosecution, and have published such photographs and videotapes without Plaintiff's consent or authorization, causing Plaintiff humiliation, mental anguish and emotional distress, while also unconstitutionally limiting her freedom of expression and her income.

22. Since the latter part of 2000, when Township began to seek to enforce the ordinance, Plaintiff and her fellow dancers, those similarly situated, have been defamed by Township officials, including police officers, acting under color of law, by stating that she and all of her fellow dancers are of bad character, criminals and of loose morals, causing Plaintiff mental anguish, humiliation, emotional distress and loss of actual income.

COUNT II - DECLARATORY JUDGMENT

23. Plaintiff incorporates by reference paragraphs 1 through 22 of this complaint as if fully set forth herein.

24. This Court has the authority to declare the rights and other relations of Plaintiff and Township.

25. This Court should declare that Plaintiff and all others similarly situated are not required to obtain a license from the Township.

26. This Court should declare the Township's ordinances are unconstitutional, in violation of Plaintiff's First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and

    1. Plaintiff asserts that the ordinance is unconstitutional, in that it does not further a substantial government interest, is not narrowly

tailored to such governmental interest and is greater than necessary to further any governmental interest alleged.

2. Plaintiff asserts that the ordinance is unconstitutional in that the ordinance is not based on substantial material justification for the severe restrictions imposed on a First Amendment constitutionally protected activity.

3. Plaintiff asserts that the ordinance is unconstitutional as it unduly restricts Plaintiff's rights by "unconstitutional conditions" to offer expressive performance dance activities at The Garter Belt, Inc., contrary to the First and Fourteenth Amendments of the United States Constitution.

4. Plaintiff asserts that the ordinance is unconstitutional as it acts as prior restraint on constitutionally protected speech, contrary to the First and Fourteenth Amendments of the United States Constitution.

5. Plaintiff asserts that the ordinance violates Plaintiff's

rights to due process, as secured by the Fourteenth Amendment.

6. Plaintiff asserts that the ordinance is vague and overbroad, contrary to the First and Fourteenth Amendments of the United States Constitution.

7. Plaintiff asserts that she has been denied equal protection under the law, contrary to the First and Fourteenth Amendments of the United States Constitution.

27. This Court should declare the restrictions on commercial speech, as set forth above, are unconstitutional as they unduly prohibit Plaintiff's right to engage in lawful commercial speech.

28. This Court should declare that the ordinances, alone and/or in combination, are unconstitutional in that they fail to give prompt judicial review of an adverse licensing decision and lacks necessary procedural guarantees.

29. This Court should declare the ordinances unconstitutional as they are not supported by evidence justifying the restrictions on speech or related activities and are therefore unconstitutional.

30. The ordinance was directed to put The Garter

to 42 U.S.C. 1988 in seeking to have the aforementioned ordinances declared unconstitutional.

WHEREFORE, Plaintiff prays for a judgment in favor of Plaintiff: (1) declare that the aforestated ordinances are unconstitutional; (2) order a preliminary injunction; (3) order a permanent injunction; (4) award compensatory damages in excess of $50,000.00 and actual attorney fees and costs.

Dated: September 13, 2002 Respectfully Submitted,

_____/s/_____
Michael L. Donaldson (P35780)
Attorney for Plaintiff
31564 Schoolcraft
Livonia, MI 48150
(734) 261-8140

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHER DIVISION

SAMANTHA BATES
Plaintiff,

vs.

TOWNSHIP OF VAN BUREN
A Municipal Corporation
Defendant.

Case No. 02-73692
Hon. Patrick J. Duggan

_____/

MICHAEL L. DONALDSON (P35780)
Attorney for Plaintiff
31564 Schoolcraft
Livonia, MI 48150
(734) 261-8140

PATRICK B. MCCAULEY (P17297)
DAVID J. SZYMANSKI (P40734
Attorneys for Defendant
Sommers, Schwartz,
Silver & Schwartz, P.C.
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

GREGORY A. ROBERTS (P33984)
Co-Counsel for Defendant
Cummings, Mclorey,
David & Acho, PLC
33900 Schoolcraft
Livonia, MI 48150
(734) 261-2400

DEFENDANT'S MOTION FOR MORE DEFINITE

STATEMENT OF PLAINTIFF'S COMPLAINT ALLEGATIONS

NOW COMES Defendant Charter Township of Van Buren, by and through its attorneys, Sommers, Schwartz, Silver & Schwartz., P.C., and for its Motion for More Definite Statement of Plaintiff's Complaint Allegations pursuant to FRCP 12(e), states as follows:

1. On September 16, 2002, Plaintiff Samantha Bates filed her Complaint for Declaratory Judgment, violation of Civil Rights, Permanent Injunction and Attorney fees is this action. (Exhibit A).

2. By her Complaint, Plaintiff Samantha Bates, a topless/nude dancer, alleges that a hose of ordinances (Exhibit B) of Defendant Charter Township of Van Buren ("Defendant Township") related to sexually oriented businesses (SOB's), dancers and entertainers violate various provisions of the U.S. Constitution, seeks a declaratory judgment declaring that the ordinances are unconstitutional, seeks a preliminary and permanent injunction preventing the enforcement of unspecified ordinances and seeks payment of actual attorney fees and costs. See Plaintiff's Complaint for Declaratory Judgment, Violation of Civil Rights, Permanent Injunction and Attorney Fees attached as Exhibit A.

3. The Plaintiff's Complaint (Exhibit A) is so vague and ambiguous that the Defendant Township cannot reasonably frame a responsive pleading because of the following defects and necessary additional details:

BEST AVAILABLE COPY

Paragraph 16: By this paragraph, the Plaintiff alleges that some " actions of the Township are intended to and do, in fact impose prior restraint on a constitutionally protected activity and have a chilling effect on Plaintiff's ability to continue to dance and earn a living." The allegation is overly vague and ambiguous, and the Defendant is entitled to know with more specificity: a) what "actions of the Township" allegedly impose a prior restraint; b) how "actions of the Township" allegedly impose a prior restraint; and c) how the Plaintiff's ability to continue do dance and earn a living allegedly are chilled or impaired.

Paragraph 17: By this paragraph, the Plaintiff alleges that the Defendant Township's attempts to enforce the Nudity on Licensed Premises ordinance impairs her income in interferes with her freedom of expression. The allegation is overly vague and ambiguous, and the Defendant is entitled to know with more specificity how attempts to enforce an ordinance already determined by the Michigan Court of Appeals to be constitutionally compliant "impairs" Plaintiff's income and "interferes" with her freedom of expression.

Paragraph 19: This paragraph contains a laundry list of vague, nonspecific and terribly ambiguous allegations that lump together all of the subject ordinances of the Defendant Township as allegedly violating the First, Fourth, Fifth and Fourteenth Amendments in 28 subparagraphs labeled (a) through (bb). The Defendant Township cannot reasonably be required to respond without more specifically knowing what constitutional amendments are at knowing what ordinances of the Defendant Township as allegedly violating the First, Fourth, Fifth and Fourteenth Amendments in 28 subparagraphs labeled (a) through (bb). The Defendant Township cannot reasonably be required to respond without more specifically knowing what constitutional amendments are at issue and without knowing what ordinances of the Defendant Township allegedly: act as a

prior restraint in protected activity — (a); fail to provide procedural safeguards and what safeguards allegedly are required — (b); act as safeguards and what safeguards allegedly are required — (b); act as an impermissible content-based restriction on what — (d); how unnamed ordinances are "overbroad in the application to constitutionally protected activities" — (e); how the ordinances restrict commercial speech and do not further a substantial governmental interest — (g); what privacy rights the ordinances allegedly violate - (h); what right allegedly is violated to engage in expressive activities "anonymously" - (I); what mens rea - typically implicated in criminal matters - is a constitutional "requisite" - (j); what "constitutionally impermissible reasons" exist to deny, suspend or revoke a license - (m); fail to identify what "occupational liberty interests of the Plaintiff" allegedly are violated - (n); how the ordinances in question make it "impossible" for the Plaintiff or topless bar patrons to "clearly communicate with one another" - (p); how the ordinances violate constitutional protections by "placing restrictions on the contents of performance dance entertainment" - (r); fail to identify how the ordinances constitute a 'taking" and what the ordinances allegedly "take" without "just compensation" - (s); refer to "regulations" without identifying which, that allegedly prohibit "dance entertainment" and which are "overbroad" without indicating how - (u); indicate that undefined ordinances "impermissibly" "restrain dance activities" and "deny entertainers a right to a lawful living" without giving any indication how that allegedly is done while also purportedly violating a "right of lawful association" without identifying how the same could be possible or how it allegedly is accomplished - (v); fail to indicate how the undefined ordinances were "not enacted on a proper basis" and indicate the same are "contrary to state law" without any indication as to the state law purportedly in question - (w); fail to identify how indeterminate ordinances 'permit overly broad discretion in township official"

- (y); and fail to indicate how a licensed-based business inspection requirement violates either the First, Fourth and Fourteenth Amendments as alleged - (z);

Paragraph 20: By the allegations I this paragraph, the Plaintiff contends that unnamed "Township officials" have threatened her with citation or arrest. The allegation is vague and ambiguous, and the Defendant Township is entitled to know the identity of any officials that allegedly threatened the Plaintiff in order to formulate a response. Further, the Plaintiff alleges that the same purported threats have caused her irreparable harm but refuses to provide any indication whatsoever what type of so-called "irreparable" harm she is said to have suffered. The Defendant Township is entitled to particulars, especially since the Plaintiff also alleges lost income and "other monetary damages," which would seem to cover the waterfront, as they say.

Paragraph 21: With this paragraph, which apparently supports a claim of defamation, the Plaintiff alleges that unnamed "Township officials" have "published" photographs and videotapes of the Plaintiff without the Plaintiffs consent or authorization. However, the Plaintiff does not identify the Township officials allegedly engaging in the subject acts, and, even worse, the Plaintiff fails to identify how or where the purported photos or videotapes were "published," which is a requisite allegation in support of a defamation claim. The Defendant Township is entitled to know who the Plaintiff contends took and published the alleged photos and videotapes and where and when the same allegedly were "published."

Paragraph 22: In this paragraph, the Plaintiff refers to the Defendant seeking to enforce the "ordinance" and does so without identifying what ordinance is in question, which makes a response impossible. In addition, the Plaintiff makes a direct

allegation of defamation by "Township officials" without identifying the "officials" in question and without stating to whom allegedly defamatory statements were published, by what means they were published and when they were published, which are all requisite elements of a defamation claim. Without specificity as to these various items, the Defendant is unable to respond to the allegations, and the Plaintiff should be required to provide far more definitive allegations.

Paragraph 26: By this paragraph, which consists of seven subparts, the Plaintiff attempts to make her case for declaratory relief. While there purportedly are numerous ordinances of the Defendant Township at issue, the allegations in subparagraphs 1, 2, 3, 4 and 6 are impermissibly vague and make a response impossible because each refers to "the ordinance" in singular form. As a result, the Defendant has no idea what ordinance is in question, is unable to respond to the allegations because of such vagueness and is entitled to a definite statement of which ordinances are implicated in the Plaintiff's request for declaratory relief.

4. For all the reasons discussed with particularity above, the Plaintiff's Complaint for Declaratory Judgment, Violation of Civil Rights, Permanent Injunction and Attorney Fees is so vague and ambiguous that the Defendant Township cannot reasonably frame a responsive pleading.

WHEREFORE, Defendant Charter Township of Van Buren respectfully requests that this Honorable Court enter its Order granting the Defendant's instant Motion and directing the Plaintiff, within 10 days, to submit a First Amended Complaint for Declaratory Judgment, Violation of Civil Rights, Permanent Injunction and Attorney Fees that provides a more definite statement of the Plaintiff's allegations and provides the necessary detail described herein so that the Defendant may frame a proper responsive pleading.

SOMMERS, SCHWARTZ
SILVER & SCHWARTZ, P.C.

By:_____/S/_____
David J. Szymanski (P40734)
Attorneys for Defendant Charter
Township of Van Buren
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

Dated: September 30, 2002

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT OF PLAINTIFF'S COMPLAINT ALLEGATIONS

In support of its foregoing Motion for more Definite Statement of Plaintiff's Complaint Allegations, Defendant Charter Township of Van Buren relies upon FRCP 12(e) and the case law thereunder.

SOMMERS, SCHWARTZ
SILVER & SCHWARTZ, P.C.

By:_____/S/_____
David J. Szymanski (P40734)
Attorneys for Defendant Charter
Township of Van Buren
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

Dated: September 30, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SAMANTHA BATES
Plaintiff,

File No. 02-73692

Hon. Avern Cohn

TOWNSHIP OF VAN BUREN,
a Municipal Corporation
Defendant.
_____/

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, VIOLATION OF CIVIL RIGHTS, PERMANENT INJUNCTION AND ATTORNEY FEES

NOW COMES Plaintiff, Samantha Bates, by and through her attorney, Michael L. Donaldson, and for her First Amended Complaint on behalf of herself and others similarly situated says:

PARTIES AND JURISDICTION

1. Plaintiff is a resident of Livingston County, State of Michigan.
2. Defendant, Township of Van Buren, [hereinafter "Township"]County of Wayne, State of Michigan, is a Charter Township and corporate body, pursuant to MCL 42.1, et seq; MSA 5.46(1), et seq.
3. Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1331and 28 U.S.C. 1343(3) for violation of the First and Fourteenth

Amendments of the United States Constitution. Further jurisdiction is vested pursuant to 42 U.S.C. 1983.

4. Plaintiff's claim to attorney fees is based on 28 U.S.C. 1988.

5. Jurisdiction of this Court to grant injunctive relief is based on 28 U.S.C. § 2202.

6. Venue is proper for the Eastern District of Michigan as all parties reside or conduct business within this judicial district.

COMMON AVERMENTS

7. Plaintiff incorporates by reference paragraphs 1 through 6 of this complaint as if fully set forth herein.

8. On or about March, 1999, the Township amended its Code of Ordinances, adopting Ordinance No. 2-16-99(2) § 6-69, entitled Nudity on Licensed Premises which, in Subsection (1), provides:

(1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

(2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:

(a) the whole or part of the pubic region;
(b) the whole or part of the anus;

(c) the whole or part of the buttocks;
(d) the whole or part of the genitals;

(3) Every word, sentence, clause and provision of this section is hereby declared to be severable, and if any word, sentence, cause provision or part thereof is declared to be invalid by a court of competent jurisdiction, the remaining provisions shall not be affected.

(4) The provisions of any or all code sections or subparts thereof in conflict herewith are repealed only to the extent necessary to give this section full force and effect.

(5) The provisions of this section shall become effective upon its passage by the Van Buren Charter Township Board of Trustees and upon publication in accordance with the Township Charter and the statutes of the State of Michigan.

9. Township Ordinance, Article 3 § 22-106, et al requires a license to be issued to each owner of an establishment offering adult entertainment and to possess a valid entertainer's permit and requires each dancer to obtain an entertainer's permit. It states:
(a) It shall be unlawful for any owner, his agent or employee, of any theater or establishment offering any kind of show emphasizing specified sexual activities or specified anatomical areas to employ any person as a dancer or entertainer unless such person possesses a valid entertainer's permit issued by the township.
(b) It shall be unlawful for any person to provide his or her services as a dancer or entertainer in

any theater or establishment offering any kind of show emphasizing specified sexual activities or specified anatomical areas, unless such person possesses at the place of employment, a valid entertainer's permit issued by the township.

10. Township Ordinance Article 3 § 22-107 requires that the dancer must provide the Township with full name and present address, plus two previous addresses, plus a description of the type of dancing, the name and mailing address of all prospective employers, written proof of age, a physical description, a photograph, a criminal history and such other identification and information as necessary "to discover the truth of the matters specified in this section" and it must be signed under oath. The Township clerk determines the completeness of the application. Further, the ordinance requires the dancer, at the time of the application for a permit, to pay a "non-refundable application fee", the amount of which fee is not stated. However, the license itself is $150.00.

11. Township Ordinance Article 3 § 22-108 vests authority for the issuance of the entertainer's permit in the Township clerk. The application will not be honored until Township police have completed a criminal record check and a conviction involving "gambling, narcotics, prostitution, pandering or pornography, or a violation of any provision of this Article within the preceding two years will constitute grounds for refusal to issue or renew an entertainer's permit."

12. Under the foregoing ordinances, the Township clerk, in his or her discretion, decides whether an

application is complete and satisfactory, thereby causing the license to be denied.

13. The license, issued under the foregoing provisions, expires within one year.

14. Township Ordinance Article 3 § 22-106 through 22-112 has no appeal mechanism for suspension or denial of license.

15. That Plaintiff is a 26-year-old single mother of a nearly 3-year-old child. She is a high school graduate with 3 years of nursing who is nearing completion of a medical transcription course. In addition to her educational pursuits, Plaintiff is an independent contract dancer that rents space from The Garter Belt, Inc. in the Township of Van Buren and has so performed for approximately 3 years.

16. Plaintiff has expended significant time, money and resources in costuming, et al, to appear as an exotic adult dancer and the actions of the Township are intended to and do, in fact, impose prior restraint on a constitutionally protected activity: to wit, artistic and exotic performance dance and have a chilling effect on Plaintiff's, and those similarly situated, ability to continue to dance and earn a living because the restrictions on Plaintiff's and the other dancers' freedom of expression diminishes the size of the audience.

17. In the latter part of 2000, the Township of Van Buren sought to enforce the aforestated Nudity on Licensed Premises ordinance, which enforcement, as stated, substantially impairs Plaintiff's and the other dancers' income and unconstitutionally interferes with her and the other dancers' freedom of expression.

COUNT I - 1983

18. Plaintiff incorporates by reference paragraphs 1

through 17 of this complaint as if fully set forth herein.

19. The above cited ordinances, in whole and/or in part, alone or in combination with one another, facially and as applied, violate the First, Fourth, Fifth and Fourteenth Amendments, and:

(a)Acts as a prior restraint on constitutionally protected activities, contrary to the First and Fourteenth Amendments to the United States Constitution.

(b) Fail to provide for the procedural guarantees required under Freedman v. Maryland 380 U.S. 51 (1965) and FW/PBS v. Dallas 483 U.S. 215 (1990).

(c) Violate the First and Fourteenth Amendments to the united States Constitution in that it fails to require prompt judicial review or require prompt determination of an adverse determination by the approving authorities.

(d) Are not a content neutral law of general applicability but rather, is an impermissible content based restriction.

(e) Are overbroad in the application to constitutionally protected activities and violate Benton v. Playtime Theatres. 475 U.S. 41.

(f)Violate Plaintiffs constitutional rights to free speech and they are not narrowly tailored and are overbroad in their restrictions on

constitutionally protected speech contrary to the First and Fourteenth Amendments to the United States Constitution and further violate Plaintiff's Fourteenth Amendment rights to engage in a lawful occupation and attempt to impose "unconstitutional conditions" in obtaining a license to engage in constitutionally protected activities which in and of itself is a violation of the First and Fourteenth Amendments of the United States Constitution.

(g) Violate the First and Fourteen Amendments of the United States Constitution in that their restrictions on commercial speech do not further a substantial governmental interest, are not narrowly tailored to directly advance that interest, are not supported by any evidence that the restrictions would be effective in furthering any substantial governmental interest.

(h) Violate the First Amendment and the privacy rights by requiring disclosure of highly private and personal information in order to be able to engage in First Amendment protected activities.

(i) Violate the First Amendment right to engage in expressive activities anonymously by requiring disclosure of highly personal information and ownership in order to be able to engage in such activities.

(j) Fail to provide constitutionally requisite

mens rea in order to establish violations thereof and provide no ability to contest a violation which would result in a license denial, suspension and/or revocation.

(k)Violate Plaintiff's equal protection rights under the Fourteenth Amendment in that it unconstitutionally discriminates and creates and permits uneven treatment in the exercise of constitutionally protected rights in the State of Michigan by allowing standards to vary from county to county, city to city, township to township and therefore, permits differing treatment amongst individuals who desire to engage in constitutionally protected speech.

(l) Fail to further substantial governmental interests and the Ordinance provision are greater than essential to further those interests.

(m) Contain constitutionally impermissible reasons to deny, suspend or revoke a license.

(n) Violate the occupational liberty interests of the Plaintiff by impermissibly restricting occupational activities.

(o) Impermissibly single out the First Amendment protected businesses from discriminatory business regulations.

(p) Violate the First Amendment rights of entertainers by placing such restrictions

on conduct that renders it impossible for the dancers, including Plaintiff, to clearly communicate with her audience.

(q) Violate the First and Fourteenth Amendments to the United States Constitution by placing restrictions on the contents of performance dance entertainment.

(r) Constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments.

(s) Violate the substantive and procedural due process rights of Plaintiff and others similarly situated.

(t) Contain regulations prohibiting dance entertainment which are overbroad and are in violation of the First and Fourteenth Amendments of the United States Constitution.

(u) Contain dance restriction requirements which violate the First and Fourteenth Amendments in that they impermissibly restrain dance activities and they impermissibly deny entertainers a right to a lawful living and further violate the right of lawful association protected under the First Amendment of the United States Constitution.

(v) Were not enacted upon a proper basis and are contrary to 436.1916(3), but

despite statutory authority, Township threatens punishment for violation.

(w) The criminal disability provisions are unconstitutional and in violation of the First and Fourteenth Amendments.

(x) Permit overly broad discretion in township officials to grant or deny a license and/or suspend same.

(y) Are unconstitutional in that they provide for inspection of licensed business, which are unconstitutional and in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution.

(z) Are unconstitutional in that they fail to provide for prompt judicial review.

(aa) Attempt to shift the burden of paying for administrative/enforcement costs, which is unconstitutional and in violation of Plaintiff's constitutional rights as secured by the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corollary provisions of the Michigan Constitution.

20. That Township officials, including police officers, seeking to enforce the ordinance against Plaintiff and others similarly situated, acting under color of law, have threatened Plaintiff with citation and/or arrest for violation

of the ordinance and deprive Plaintiff of her constitutional rights, causing her irreparable harm and loss of income and other monetary damages.

21. At all times mentioned herein, since the ordinance was adopted, no procedure has been developed by Township for the licensing of either The Garter Belt, Inc. or of Plaintiff, although inquiries have been made to obtain such license. Despite the absence of license procedures, Township officials, including police officers, have attempted to enforce the above named ordinances and have sent Township officials and private detectives into The Garter Belt, Inc. to photograph or videotape Plaintiff dancing, under threat of prosecution, and have published such photographs and videotapes without Plaintiff's consent or authorization, causing Plaintiff humiliation, mental anguish and emotional distress, while also unconstitutionally limiting her freedom of expression and her income.

22. Since the latter part of 2000, when Township began to seek to enforce the above stated ordinances, Plaintiff and her fellow dancers have been threatened by Township officials, including police officers, acting under color of law, with threats of citation, criminally charged with prostitution, watched her audience diminish because of Township threats, resulting in injury to Plaintiff and those similarly situated, causing mental anguish, humiliation, emotional distress and loss of actual income.

COUNT II - DECLARATORY JUDGMENT

23. Plaintiff incorporates by reference paragraphs 1 through 22 of this complaint as if fully set forth

herein.

24. This Court has the authority to declare the rights and other relations of Plaintiff and Township.

25. This Court should declare that Plaintiff and all others similarly situated are not required to obtain a license from the Township.

26. This Court should declare the Township's ordinances are unconstitutional, in violation of Plaintiff's First, Fifth, and Fourteenth Amendments to the United States Constitution and

A. Plaintiff asserts that Ordinance nos. 2-16-99(2) § 6-69, Article 3 § 22-106 through 22-112 are unconstitutional, in that they do not further a substantial government interest, are not narrowly tailored to such governmental interest and are greater than necessary to further any governmental interest alleged.

B. Plaintiff asserts that the aforestated ordinances are unconstitutional in that the ordinances are not based on substantial material justification for the severe restrictions imposed on a First Amendment constitutionally protected activity.

C. Plaintiff asserts that the aforestated ordinances are unconstitutional as they unduly restrict Plaintiff's rights by "unconstitutional conditions" to offer expressive performance dance activities at The Garter Belt, Inc., contrary to the First and Fourteenth Amendments of the United States Constitution.

D. Plaintiff asserts that the aforestated ordinances are unconstitutional as they

act as prior restraint on constitutionally protected speech, contrary to the First and Fourteenth Amendments of the United States Constitution.

E. Plaintiff asserts that the aforestated ordinances violate Plaintiff's, and those similarly situated, right to due process, as secured by the Fourteenth Amendment.

F. Plaintiff asserts that the aforestated ordinances are vague and overly broad, contrary to the First and Fourteenth Amendments of the United States Constitution.

G. Plaintiff asserts that she has been denied equal protection under the law, contrary to the First Fourteenth Amendments of the United States Constitution.

27. This Court should declare the restrictions on commercial speech, as set forth above, are unconstitutional as they unduly prohibit Plaintiff's, and those similarly situated, right to engage in lawful commercial speech.

28. This Court should declare that the aforestated ordinances, alone and/or in combination, are unconstitutional in that they fail to give prompt judicial review of an adverse licensing decision and lacks necessary procedural guarantees.

29. This Court should declare the aforestated ordinances unconstitutional as they are not supported by evidence justifying the restrictions on speech or related activities and are therefore unconstitutional.

30. The aforestated ordinances were directed to put The Garter Belt, Inc. out of business and effectively destroy Plaintiff's only place available

for rental for adult dancing in Van Buren Township, thereby effectively putting Plaintiff out of business as well and taking from her a vested property interest in her dance name and reputation and the income that flows therefrom, thereby resulting in a taking of private property without just compensation and in violation of Plaintiff's procedural and substantive due process rights.

31. Plaintiff has substantial likelihood of success on the merits in regard to the constitutional claims, particularly as public interest weighs in favor of preventing deprivation of constitutional rights and the balancing of harms between the parties which gravitates toward Plaintiff.

COUNT III - INJUNCTIVE RELIEF

32. Plaintiff incorporates by reference paragraphs 1 through 31 of this complaint as if fully set forth herein.

33. For the reasons set forth above, and to preclude Plaintiff from being denied her rights under the United States Constitution, Plaintiff request the following injunctive relief:

(1) An Order to Show Cause why a preliminary injunction should not issue prohibiting Defendant from enforcing the aforestated Ordinances in their entirety, including their agents, employees and representative as well as those who receive actual or constructive notice and prohibiting Defendant from enforcing any of the aforestated Ordinances until Township has adopted a written and published procedure for licensing owners and dancers, including Plaintiff, her fellow dancers and The Garter Belt, Inc.

(2) Upon hearing enter a preliminary injunction prohibiting enforcement, by Township, of the Nudity on Licensed Premises Ordinance and the licensing provisions.

(3) Enter an order granting a permanent injunction and such other relief as the Court deems just.

COUNT IV - ATTORNEY FEES

34. Plaintiff incorporates by reference paragraphs 1 through 33 of this complaint as if fully set forth herein.

35. Plaintiff, as prevailing party, is entitled to recover actual attorney fees and costs, pursuant to 42 U.S.C. 1988 in seeking to have the aforementioned ordinances declared unconstitutional.

WHEREFORE, Plaintiff prays for a judgment in favor of Plaintiff: (1) declare that the aforestated ordinances are unconstitutional; (2) order a preliminary injunction; (3) order a permanent injunction; (4) award compensatory damages in excess of $50,000.00 and actual attorney fees and costs.

Dated:_____ Respectfully Submitted,

Michael L. Donaldson (P35780)
Attorney for Plaintiff
31564 Schoolcraft
Livonia, MI 48150
(734) 261-8140

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHER DIVISION

SAMANTHA BATES
Plaintiff,

vs.

TOWNSHIP OF VAN BUREN
A Municipal Corporation
Defendant.

Case No. 02-73692
Hon. Avern Cohn

_____/

MICHAEL L. DONALDSON (P35780)
Attorney for Plaintiff
31564 Schoolcraft
Livonia, MI 48150
(734) 261-8140

PATRICK B. MCCAULEY (P17297)
DAVID J. SZYMANSKI (P40734
Attorneys for Defendant
Sommers, Schwartz,
Silver & Schwartz, P.C.
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

GREGORY A. ROBERTS (P33984)
Co-Counsel for Defendant
Cummings, Mclorey,
David & Acho, PLC
33900 Schoolcraft
Livonia, MI 48150
(734) 261-2400

DEFENDANT'S ANSWER TO FIRST AMENDED

COMPLAINT FOR DECLARATORY JUDGMENT, VIOLATION OF CIVIL RIGHTS, PERMANENT INJUNCTION AND ATTORNEY FEES AND AFFIRMATIVE DEFENSES

NOW COMES Defendant Charter Township of Van Buren, by and through its attorneys, Sommers, Schwartz, Silver & Schwartz., P.C., and for its Answer to First Amended Complaint in the above -captioned matter, states as follows:

1. In answering paragraph 1, the Defendant can neither admit nor deny the allegations contained therein, having sufficient knowledge upon which to plead, and leaves the Plaintiff to her proofs.

2. In answering paragraph 2, the Defendant admits the allegations contained therein.

3. In answering paragraph 3, the Defendant admits that, had there been violations of the First and Fourteenth Amendments to the U.S. Constitution as alleged, jurisdiction would vest with this Court, but there have been no such violations by the Defendant.

4. In answering paragraph 4, the Defendant admits that the Plaintiff, basEs her claim for attorney fees on 42 U.S.C. Sec 1988 , but the Defendant denies that the Plaintiff is entitled to attorney fees under 42 U.S.C., 1988 or any other authority.

5. In answering paragraph 5, the Defendant admits that if there were a legitimate basis for injunctive relief, the Court would have jurisdiction to grant such relief pursuant to 28 U.S.C. Sec. 2202, but the Defendant denies that the Plaintiff is entitled to any injuctive relief.

6. In answering paragraph 6, the Defendant admits the allegations contained therein.

COMMON AVERMENTS

7. Defendant Charter Township of Van Buren hereby reaffirms and incorporates by reference its answers to paragraphs 1 through 6 of this Answer as though fully set forth herein.

8. In answering paragraph 8, the Defendant admits the allegations contained therein.

9. In answering paragraph 9, the Defendant denies as untrue the allegations contained therein for the reason that the subject ordinance no longer is in effect, has been repealed and has been superseded.

10. In answering paragraph 10, the Defendant denies as untrue the allegations contained therein for the reason that the subject ordinance no longer is in effect, has been repealed and has been superseded.

11. In answering paragraph 11, the Defendant denies as untrue the allegations contained therein for the reason that the subject ordinance no longer is in effect, has been repealed and has been superseded.

12. In answering paragraph 12, the Defendant denies as untrue the allegations contained therein for the reasons that the subject ordinances in Article 3 sections 22-81 through 22-112 no longer are in effect, have been repealed and have been superseded.

13. In answering paragraph 13, the Defendant denies as untrue the allegations contained therein.

14. Defendant denies as untrue the allegations the subject ordinances in Article 3 sections 22-81 through 22-112 no longer are in effect, have been repealed and have been superseded.

15. In answering paragraph 15, the Defendant denies as untrue the allegations contained therein.

16. In answering paragraph 16, the Defendant admits that it has sought to enforce the Nudity on Licensed Premises ordinance, which ordinance both State of Michigan circuit and appellate courts already have found to be constitutionally compliant, and the Defendant further denies that the subject ordinance impairs Plaintiff's income or is in any manner an unconstitutional interference with plaintiff's freedom of expression.

COUNT I
1983

17. Defendant Charter Township of Van Buren hereby reaffirms and incorporates by reference its answers to paragraphs 1 through 16 of this Answer as though fully set forth herein.

18. In answering paragraph 18, the Defendant, for the reasons described above, denies as untrue the allegation contained therein, especially including the allegations contained in paragraph 18 subparts (a) through (aa).

19. In answering paragraph 19, the Defendant denies as untrue the allegations contained therein, and, by way of further response, the Defendant states that the Plaintiff has pending against her criminal charges for engaging in

acts of prostitution.

20. In answering paragraph 20, the Defendant denies as untrue the allegations contained therein.

21. In answering paragraph 21, the Defendant denies as untrue the allegations contained therein, and by way of further response, the Defendant states that the Plaintiff has pending against her criminal charges for engaging in acts of prostitution.

COUNT II
DECLARATORY JUDGMENT

22. Defendant Charter Township of Van Buren hereby reaffirms and incorporates by reference its answers to paragraphs 1 through 22 of this Answer as though fully set forth herein.

23. In answering paragraph 23, the Defendant admits the allegations contained therein, but, by way of further answer, the Defendant states that there is no legitimate basis for such a declaration in this action.

24. In answering paragraph 24, the Defendant denies as untrue the allegations contained therein for the reason that, as described above, there is no requirement that the Plaintiff obtain a license from the Defendant.

25. In answering paragraph 25, the Defendant, for the reasons described above, denies as untrue the allegations contained therein, especially including the allegations contained in paragraph 25 subparts 1, through 7.

26. In answering paragraph 26, the Defendant denies as

untrue the allegations contained therein for the reason that the Defendant has not and does not engage in the unconstitutional restriction of commercial speech.

27. In answering paragraph 27, the Defendant, for the reasons stated above, denies as untrue the allegations contained therein.

28. In answering paragraph 28, the Defendant, for the reasons stated above, denies as untrue the allegations contained therein.

29. In answering paragraph 29, the Defendant denies as untrue the allegations contained therein.

30. In answering paragraph 30, the Defendant denies as untrue the allegations contained therein.

COUNT III
INJUNCTIVE RELIEF

31. Defendant Charter Township of Van Buren hereby reaffirms and incorporates by reference its answers to paragraphs 1 through 31 of this Answer as though fully set forth herein.

32. In answering paragraph 32, the Defendant denies that the Plaintiff is entitled to any form of injunctive relief as her claims are frivolous, without merit and brought only to harass, annoy and unduly burden the Defendant, and the Defendant specifically denies that the Plaintiff is entitled to the injunctive relief requested in paragraph 32 at subparts (1) through (3).

COUNT IV

ATTORNEY FEES

33. Defendant Charter township of Van Buren hereby reaffirms and incorporates by reference its answers to paragraphs 1 through 33 of this Answer as though fully set forth herein.

34. In answering paragraph 34, the Defendant denies as untrue the allegation that the Plaintiff is or ever will be the prevailing party in this action, which is frivolous, without merit and brought only to harass, annoy and unduly burden the Defendant and the Defendant further states that the Plaintiff is not nor ever will be entitled to attorney fees.

WHEREFORE, Defendant Charter Township of Van Buren respectfully requests that this Honorable Court deny the relief requested by the Plaintiff, enter a judgment of no cause of action in favor of the Defendant, dismiss the First Amended Complaint for Declaratory Judgment, Violation of Civil Rights, Permanent Injunction and Attorney Fees with prejudice and award to the Defendant its costs and attorney fees so wrongfully incurred.

SOMMERS, SCHWARTZ,
SILVER & SCHWARTZ, P.C.

By: _____/S/_____
David J. Szymanski (P40734)
Attorneys for Defendant Charter
Township of Van Buren
2000 Town Center, Suite 900
Southfield, MI 48075

Dated: November 27, 2002

contained in Article III of the Defendant's ordinances related to dancers and entertainers (Secs. 22-81 through 22-112) are barred by the fact that those ordinances no longer are in effect, have been repealed and have been superseded.

9. The claims of the Plaintiff related to the Defendant's ordinance entitled Nudity on Licensed Premises are barred by the fact that the ordinances already has been determined to be constitutionally compliant in all respects by both Michigan circuit and appellate courts.

11. The Plaintiff's claims are barred by the doctrines of res judicata and collateral estoppel.

12. The Plaintiff has not plead and cannot establish any elements, circumstances or injuries required to warrant the injunctive and other relief she requests.

13. The Plaintiff has not plead with the requisite specificity and cannot establish any of the elements required to support any claim for damage to the Plaintiff's reputation as alleged in the Plaintiff's first Amended Complaint.

14. The Defendant's ordinances or regulations complained of by the Plaintiff were not designed to, were not intended to and do not improperly suppress protected expression.

15. The Defendant's ordinances or regulations complained of by the Plaintiff were and/or are proper regulations based on a compelling governmental interest designed to address adverse secondary effects.

16. The ordinances that are the subject of Plaintiff's First Amended Complaint are not an unconstitutional prior restraint.

17. The ordinances that are the subject of Plaintiff's First Amended Complaint provide all necessary and reasonable procedural safeguards.

18. The ordinances that are the subject of Plaintiff's First Amended Complaint are content neutral and constitutionally compliant in all respects.

19. The ordinances that are the subject of Plaintiff's first Amended Complaint are narrowly tailored to further a substantial and compelling governmental interest and provide required procedural guarantee3s.

20. The ordinances that are the subject of Plaintiff's first Amended Complaint do not impose unconstitutional conditions.

21. The ordinances that are the subject of Plaintiff's First Amended Complaint do not violate privacy or any First Amendment rights, and neither the Defendant nor any of its employees, agents, servants or representatives have violated such rights.

22. The ordinances that are the subject of Plaintiff's first Amended Complaint do not violate equal protection requirements.

23. The ordinances that are the subject of Plaintiff's first Amended Complaint are not vague, overbroad or unduly restrictive regarding the lowest possible order of protected "speech."

24. The ordinance that are the subject of Plaintiff's First Amended Complaint do not provide unwarranted discretion in local governmental officials or governing bodies.

25. The ordinances that are the subject of Plaintiff's First Amended Complaint constitute the proper exercise of the Defendant's police power under both the U.S. and state constitutions.

26. The ordinances that are the subject of the Plaintiff's First Amended Complaint are not pre-empted by state statutes, provide for prompt judical review and are the proper exercise of local governmental authority granted under state statutes.

27. The Defendant reserves the right, upon the completion of discovery or before, to file additional affirmative defenses as may be appropriate and necessary.

SOMMERS, SCHWARTZ,
SILVER & SCHWARTZ, P.C.

By: _____/S/_____
David J. Szymanski (P40734)
Attorneys for Defendant Charter
Township of Van Buren
2000 Town Center, Suite 900
Southfield, MI 48075

Dated: November 27, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SAMANTHA BATES
Plaintiff,

File No. 02-73692
v.
Hon. Avern Cohn

TOWNSHIP OF VAN BUREN,
a Municipal Corporation
Defendant.

MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES Plaintiff, Samantha Bates, by and through her attorney, Michael Donaldson, pursuant to F.R. Civ P 56(a) and moves this Honorable Court for Partial Summary Judgment and shows unto this Honorable Court as follows:

1. Attached hereto and incorporated by reference is Plaintiff's brief in support of this motion, together with 4 exhibits, 3 depositions and one unpublished United States District Court case, McKee v. City of Casselberry.
2. Pages 1 through 5 of the brief are the Statement of Material Facts Not in Dispute.
3. The first issue presented to the Court is the standard of review. Township has repeatedly asserted that the appropriate standard of review is rational basis and Plaintiff asserts that the standard now is intermediate scrutiny, perhaps strict scrutiny, but not rational basis.

4. It is undisputed that Defendant Township conducted no investigation and relied on no evidence regarding other studies or investigations regarding purported adverse secondary effects before adopting the ordinance in question. See depositions of Payne, King and Perkins. Under the law set forth in the brief, absent evidence of adverse secondary effects, the adoption of the ordinance was unconstitutional.

5. It is further clear, from the face of the ordinance, that it is overly broad, contrary to Triplett Inc. v. City of Akron, 40 F. 3d 129 (6th Cir. 1994).

6. That absent evidence of secondary effects and the overbreadth clearly set forth on the face of the ordinance, the ordinance is unconstitutional and as to this issue, Plaintiff is entitled to partial summary judgment.

WHEREFORE, Plaintiff prays that this Honorable Court declare the Nudity on Licensed Premises ordinance to be unconstitutional and, as set forth in the brief, in the event that the City disagrees that the general nudity ordinance is preempted by the State of Michigan under the Liquor Control Act, then Plaintiff asserts that the general nudity ordinance is, for the same reasons, unconstitutional.

Dated:_____ Respectfully Submitted,

_____/s/_____

Michael L. Donaldson (P35780)
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

SAMANTHA BATES
Plaintiff, File No. 02-73692
v. Hon. Avern Cohn

TOWNSHIP OF VAN BUREN,
a Municipal Corporation
Defendant.
/

Michael L. Donaldson (P35780)
Attorney for Plaintiff
31564 Schoolcraft
Livonia, MI 48150
(734) 261-8140

Sommers, Schwartz, Silver & Schwartz, P.C.
David J. Szymanski (P40734)
Attorney for Defendant
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300
/

**BRIEF IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY JUDGMENT**

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STATUTES:

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STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

On March 2, 1999, Defendant. Van Buren Township, adopted two (2) Ordinances designed to prohibit public nudity within the Township. The first Ordinance, 2-16-99 (2) attempts to prescribe public nudity at an establishment located within the Township, which is licensed by the Michigan Liquor Control Commission to serve liquor on its premises.

Ordinance 2-16-99 (2) provides as follows:

> (1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work for, or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.
>
> (2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:
>
> the whole or

part of the pubic
region;
the whole or
part of the anus:
the whole or part of the buttocks;
the whole or part of the genitals;
the breast area including nipple, or
more than one-
half of the area of the breast.

Ordinance 58-206, regarding "Public Indecency" states:

(a) For purposes of this section, "nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola, or the showing of the covered male genitals in a discernibly turgid state. For purposes of this section, nudity shall not include a woman's breastfeeding of a baby whether, or not the nipple or areola is exposed during or incidental to the feeding.

(b) For purposes of this section, "public place or vehicle" means any of the streets, alleys,

> parks, boulevards, schools or other public property in the township, or any dance hall, rental hall, theater, amusement park, liquor establishment, store, depot, place of public accommodation or other private property generally frequented by the public for the purposes of education, recreation, amusement, entertainment, sport, shopping or travel; or any vehicle for public transportation, owned or operated by government, either directly or through a public corporation, or authority, or owned or operated by any nongovernmental agency for the use, enjoyment or transportation of the general public.

Township appears to acknowledge that the general nudity ordinance does not apply to persons, such as Plaintiff, who are dancers in establishments licensed by the Michigan Liquor Control Commission. Township appears to acknowledge that absent an ordinance directed specifically at adult entertainment facilities, the State, in establishments licensed by the Liquor Control Commission, has preempted control. The argument that follows hereinafter will be directed primarily at Ordinance 2-16-99(2), based on the foregoing premise. If Township disagrees, the arguments of Plaintiff would be applicable to both the general nudity ordinance under Public Indecency and the Nudity on

Licensed Premises ordinance.

The Township derived the power to adopt the Ordinances from MCL 41.181;MSA 5.45(1).MCL 41.181(1) provides as follows:

> Sec. 1. (1) The township board of a township may, at a regular or special meeting by a majority of the members elect of the township board, adopt ordinances regulating the public health, safety, and general welfare of persons and property, including, but not limited to ordinances concerning...the regulation or prohibition of public nudity, and may provide sanctions for the violations of the ordinances...
>
> "Nudity"; Knowingly or intentionally displaying in a public place, or for payment or promise of payment by any person, including but not limited to, payment or promise of payment of an admission fee, any individual's genitals or anus with less than a fully opaque covering, or a female breast with less than a fully opaque covering of the nipple or areola.

There are no exceptions in the ordinances for nudity in a public place such as theaters, art schools, universities, opera houses, bath houses, stadiums, health clubs, or the like. Nudity is banned at all times in establishments licensed to sell liquor by the Michigan Liquor Control Commission, as well as in any public place. The ordinances ban the showing of nudity in movies at theaters which sell liquor and those that do not.

At all times relevant, Plaintiff, Samantha Bates was an independent contractor exotic performance artist [topless dancer] dancing at The Garter Belt, Inc. in Van Buren Township. Plaintiff has been an exotic dancer and performance artist in excess of 7 years. Plaintiff's income and primary source of income comes from her performance art. Since the passage of the ordinances, Plaintiff's freedom of expression has been severely limited. Plaintiff can no longer dance as she has danced at The Garter Belt before the adoption of the ordinances and as she has danced elsewhere, before appearing at The Garter Belt. Plaintiff's income, as a result of the limitations on her art, has been severely reduced.

The depositions of Joannie Payne, Van Buren Township Clerk and member of the Township Board of Trustees at the time the ordinances were adopted (Exhibit 1) and Cindy King, Township Supervisor and member of the Van Buren Township Board of Trustees (Exhibit 2) when the ordinances were adopted were deposed in another matter pertaining to the same ordinance. The depositions are attached hereto and incorporated by reference.

Joannie Payne testified that she was aware of no complaints generated because of The Garter Belt Inc's business in Van Buren Township, which included Plaintiff's performances. Ms. Payne stated that she did not know anyone

who lives in the Township who has been negatively affected by the exotic dancing at The Garter Belt. Further, she stated that she was not aware of any complaints regarding any decrease in property values or increase in the crime surrounding The Garter Belt where Plaintiff performed. (Payne Dep pp 20-22).

Cindy King testified in a similar manner. She stated that neither the Board of Trustees nor any agent of Van Buren Township had conducted any studies regarding the effects of topless dancing in Van Buren Township and that the Board of Trustees did not review any outside studies that had been done in other communities in connection with the adoption of the nudity ordinances. Further, she testified that no individual had testified or brought any information to the Township board relevant to these issues. (King Dep p 22).

Ms. King testified that no one provided information to her nor was there any discussion as to how requiring dancers, such as Plaintiff, to cover more body parts would result in a reduction of alleged secondary effects. (King Dep p 33). She testified that the ordinances were adopted as a matter of **ministerial function** of updating the Township's ordinances. (King Dep p 36). Ms. King testified that there were no complaints about nudity at The Garter Belt or other problems associated with the bar, such as restricting Township's growth or inhibiting or affecting property values in the Township. (King Dep p 35-36).

In addition to the deposition of Ms. Payne and Ms. King in the collateral litigation, former police chief Mark Perkins was also deposed. (Exhibit 3). According to Chief Perkins, investigations into alleged higher crime rates following the adoption of the ordinances revealed that the increase in crime rate related to a shopping center located

that where speech protected by the First Amendment is abridged, "it is not shielded from constitutional scrutiny by the Twenty First Amendment." 44 Liquormart, 517 US at 489. And, the Supreme Court clearly stated that **"We now hold that the Twenty First Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."** Id, at 517. (Emphasis added). In addition, the Court stated "Without questioning the holding in LaRue, infra, we now disavow its reasoning insofar as it relied upon the Twenty First Amendment." Id, at 517. Every court that has been briefed and has considered 44 Liquormart since the time of its decision has followed the above conclusion.

In Junction 615 v. Ohio Liquor Control Commission, 732 NE 2d 1025 (Ohio Ct. App. 1999), the Ohio Court of Appeals noted that the U.S. Supreme Court had held that "The Twenty first Amendment could not be used to qualify protections afforded by other constitutional provisions, and overturned the reasoning in the [California v.] LaRue [409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 343 (1972) decision." 732 N.E. 2d at 1031.

The Ohio Court of Appeals reasoned that it then must disregard a Ohio Supreme Court decision that had relied strongly on the reasoning in LaRue (just as the Jott Court did in Michigan) because it was not analyzed under "current First Amendment standards." Id. (See also Saints & Sinners a/k/a R.I. Cranston Entertainment, Inc v. city of Providence, 2001 U.S. Dist Lexis 18664, at slip op. 18 (D., R.I., 2001) ["When issuing a liquor license, a state must comply with the Constitutional requirements of the First Amendment, despite the presence of the Twenty First Amendment."]

The exact same circumstance is at hand here, in that the "current First Amendment standards" are no longer LaRue, but the Supreme Court decision in 44 Liquormart and Pap's. It is equally important to note that the court in Jott applied only the **lowest level of scrutiny — rational basis — in regard to the ordinance that it was examining.** 569 NW 2d at 851. 44 Liquormart makes it clear, however, that "the Supreme Court also reaffirmed that the O'Brien **intermediate level of review** applied to the **prohibition of nudity** in liquor license establishments..." Purple Orchid Inc. v. Pennsylvania State Police, 721 A.2d 84 (Pa. Comm. Ct. 1998) (Emphasis added).

That intermediate scrutiny is clearly the appropriate standard **now**, in regard to this ordinance, is further confirmed by Pap's, which also applied the O'Brien level of **intermediate scrutiny** to a nudity prohibition that affected liquor clubs, and City of Los Angeles v. Alameda Books, Inc., 538 U.S. 425 (2002) Accordingly, Jott did not even analyze the ordinance at issue, therein, under the level of constitutional scrutiny, which all courts must now apply in light of the decisions in 44 Liquormart, Pap's and City of Los Angeles.

The United States Supreme Court has, on no less than four occasions, recognized that nude and partially nude dance performance activities of the type sought to be presented by Plaintiff is expression of speech, protected by the First Amendment to the United States Constitution, as made applicable to the States by operation of the Fourteenth Amendment. (See City of Los Angeles, Pap's and Barnes v. Glenn Theatre, Inc., 501 S. Ct. 560; 1111 S. Ct. 2456; 115 L. Ed. 2d. 504 (1991) (8 Justices); and Schad v. Borough of Mt. Ephraim, 452 U.S. 61; 101 S. Ct. 2176; 65 L. Ed 2d 671

(1981).

Part of the problem here may stem from the timing of the publication of Jott and 44 Liquormart. 44 Liquormart was decided on May 13, 1996. Jott was decided July 15, 1997, but was submitted on November 20, 1996. The court in Jott could not have been briefed on the relevance of 44 Liquormart. In a footnote that can be no more than dicta, the court stated that "We reject plaintiff's claim, asserted at oral argument, that the holding in LaRue was recently overruled by the Supreme Court in 44 Liquormart." Jott, at p. 540. Every other court in the United States that has considered this question came to the opposite conclusion of the court in Jott.

Because Jott has been effectively abrogated by 44 Liquormart and Pap's, et al, Township's reliance on Jott as authority for the ordinance is misplaced.

II. WHETHER TOWNSHIP'S ANTI-NUDITY ORDINANCES FAIL TO FURTHER AN IMPORTANT OR SUBSTANTIAL GOVERNMENT INTEREST?

The standard for determining the constitutionality of legislation which impacts upon First Amendment freedoms is what is commonly referred to as intermediate scrutiny and requires, as a majority of the Justices of the Supreme Court concluded in Pap's, (120 S. Ct. At 1391, 1402) that a general "across-the board" anti-nudity provision was to be evaluated as a content-neutral regulation pursuant to the four part test of O'Brien, which analyzes:

> 1. Whether the regulation at issue is within the

government's power;
2. **Whether the regulation furthers an important or substantial governmental interests;**
3. Whether the governmental interest is unrelated to the suppression of free expression; and
4. Whether the incidental restriction on alleged First Amendment freedom is no greater than essential to the furtherance of that interest.

In Pap's, a majority of the Court also concluded that the sole justification for enacting such a prohibition would be in regard to the "secondary effects" of certain forms of adult entertainment establishments. See, e.g. Pap's. 120 S. Ct. At 1393-94, 1402. In considering the predicate of such "secondary effects" (such as increase of crime, decrease in property values, increase in urban blight) as a justification for enacting a regulation:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities; so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the

city addresses.

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed 2d 29 (1986). Accordingly, to pass constitutional muster under the "secondary effects" doctrine, a city must: (1) Have a problem; and (2) be in possession of **evidence** of the problem that it (3) relies upon and (4) that is **reasonably believed to be relevant** to the problem to be addressed.

In City of Los Angeles, supra, the decision of the Court was 4-1-4. However divided, the entire Court agreed that a municipality prior to adopting an ordinance which impacts speech, to reasonably rely upon evidence of alleged secondary adverse effects. [Justice O'Connor] Justice Kennedy wrote "A city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects **while leaving the quantity and accessibility of speech substantially intact."** (Emphasis added). Under the Supreme Court decision in Marks v. U.S., 430 U.S. 188 (1977), Snead v. Regland Aggregates Ltd, 998 F. 2d 1325, 1333 n 10 (5th Cir. 1993) Plaintiff submits Justice Kennedy's opinion is the minimum holding of City of Los Angeles. This position appears to be supported by the 5th Circuit in Encore Videos Inc., v San Antonio, 00-51119 (5th Cir. 4/29/03).

When considering the adoption of the ordinance, there is absolutely no evidence that the Township met the Renton evidentiary burden. The deposition testimony of Joannie Payne and Cindy King reveals that the City considered no evidence of secondary effects. As stated, Joannie Payne testified that she was aware of no complaints regarding The Garter Belt, where Plaintiff danced, and knew no one that

was negatively affected by Plaintiff performing topless at The Garter Belt. She further testified that she was aware of no complaints regarding a decrease in property values.

Cindy King testified that neither the Board of Trustees nor anyone else did any studies on the effects of adult entertainment and they reviewed no outside studies. Further, she testified that no one provided the Board members with any information relevant to secondary effects or how requiring dancers, such as Plaintiff, to cover more body parts would result in any reduction in alleged secondary effects.

In XLP Corp. V. County of Lake, 743 NE 2d 162 (Ill. App. 2000), the government sought summary disposition in regard to a constitutional challenge to an adult business regulatory ordinance. The trial court granted summary judgment on the pleadings, and the appellate court reversed, noting that:

> None of the cases cited by the Defendant in support of its position that a governmental body can rely on outside studies, judicial decisions, and the experiences of other governments in other jurisdictions in adopting its legislation were decided on a motion for judgment on the pleadings as occurred here. Nor has our research revealed any cases of this nature. In every case relied upon by Defendant, **the affected party had an opportunity to go to trial or to test the assertions**

> **of governmental interests in an evidentiary proceeding.** This was true even in Pap's v. City of Erie where, as pointed out in the Supreme Court's opinion, the affected party had ample opportunity to contest the city council's findings about secondary effects, including in-state proceedings, although it never chose to do so. Pap's v. City of Erie, 529 US at 298.

XLP, at 167-168 (emphasis and clarification added).

The county in XLP also attempted to rely on Renton for the proposition that a legislative body does not have to wait until a problem occurs before enacting an adult use ordinance. 743 NW 2d at 170. But the court noted that there was a crucial difference, because in Renton there were no adult businesses in existence at the time the city enacted its ordinance...and that in the case before the bar, where plaintiffs had been in business for fifteen years at the time defendant enacted its ordinance, plaintiffs allegations that defendant wrongly relied on outside studies instead of considering plaintiff's existing business to determine whether such businesses cause adverse secondary effects presented an **issue of fact**. Id. At 170 (clarification and emphasis added). Because a factual dispute existed on this issue, the court determined that the case must be sent back for further proceedings. In this case, Township relied on no studies, internal or external, and no factual issue exists.

In a similar case to the case before this Court, the Eleventh Circuit considered the constitutionality of an ordinance prohibiting various forms of nude and partially nude dancing in liquor establishments in Flanigans Enterprises, Inc., v. Fulton County, 242 F. 3d 976 (11th Cir. 2001). The court noted that in evaluating whether the government has met its burden under O'Brien, the Defendants must have "some factual basis for the claim that [adult] entertainment in an establishment serving alcoholic beverages results in increased criminal activity and other undesirable community conditions." Id at 985 (internal cites omitted).

The court determined that the evidence in the record relating to the conditions in Fulton County shows unequivocally that property values in neighborhoods adjoining the Clubs have increased during the time the Clubs have been in existence and the surrounding buildings show no sign of blight, or lack of physical maintenance. Moreover, the Fulton County police study found greater reported crime connected with establishments that served alcohol but did **not** feature adult entertainment. Id, at 986.

The Court basically determined that where **local evidence** showed no secondary effects, the governmental body could not simply ignore it.[1] The Court concluded by stating that "the case might be different were the clubs a recent addition to Fulton County neighborhoods, therefore justifying sole reliance on outside studies. It is undisputed, however, that plaintiffs continually operated these adult entertainment establishments for nearly a decade." Id, at 986. The same circumstances exist here. The Garter Belt, when

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1. Testimony of Payne and King referred to above.

Plaintiff performed, had been in existence for more than 15 years.

Similarly, in Erie Boulevard Triangle Corp. v. City of Schenectady, 152 F. Supp 2d 241 (N.D.N.Y. 2001), the Court evaluated the constitutionality of an amendment to a zoning ordinance dealing with adult businesses. In ruling the amendment unconstitutional under the Renton standard, the Court concluded that, as is the case here, "the city has submitted no evidence whatsoever that either the 1999 amendment or the 2000 amendment was designed to address secondary effects of adult businesses within the city which were not adequately addressed by the initial version of the adult ordinance, or that plaintiff's businesses are responsible for any adverse secondary effects in their current, grand-fathered locations." Id, at 247.

In McKee v. Casselberry, No. 99-A-1430-16J-E (Seminole county Fl, March 22, 2002) (Exhibit 4), the Court was asked to consider the constitutionality of the City of Casselberry's anti-nudity ordinance. In denying the City's Motion for Summary Judgment, the Court stated:

> In City of Renton, the Court held that in making legislative findings a city is entitled to rely upon prior studies and is not required to conduct new studies. In fact, the City of Renton relied upon an opinion from the Supreme Court of Washington in making its legislative findings. See, Northern Cinema, Inc. v. Seattle, 585 P. 2d 1153 (Wash. 1978). The ordinance in

question here contains legislative findings and if the City of Casselberry "reasonably relied" upon information provided to it in making the findings that resulted in the enactment of the ordinance, the courts have no business interfering with that legislative function. City of Daytona Beach v. Del Percio, 476 So. 2d 197 (Fla. 1985).

But what if the City of Casselberry did not rely upon any information or relied upon false information in making its findings? And what if the information relied upon provided no reasonable nexus to the problem addressed by the ordinance? What if the City of Casselberry's actual experience demonstrates an absence of secondary effects? If one or more of these questions are answered affirmatively, how can it be said that the City of Casselberry's reliance upon information provided to it was "reasonable?" See, Erie Boulevard Triangle Corp v. City of Schenectady, 152 F. Supp 2d 241 (N.D.N.Y. 2001). Surely, protected expressive

conduct should not be suppressed based upon flawed, false or faulty information. And, like it or not, erotic nude dancing is expressive conduct within the outer ambit of the First Amendment's protection. City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2001) (Plurality Opinion.)

Additionally, what if the City of Casselberry in fact reasonably relied upon information it received in making its legislative findings? Does the inquiry stop there? Apparently not. The third prong of the test set forth in O'Brien requires "an adequate alternative means of communication?" to be "left open." The plain terms of the City of Casselberry's ordinance requires dancers to wear the same type of attire one would expect to see at the beach or at a public swimming pool. Can this requirement be categorized as a "de minimis" intrusion upon First Amendment guarantees? See Barnes v. Glen Theatres, Inc., 501 U.S. 560, 565-66 (1991)..

(Casselberry, Slip Op, 2-3).

In this case, there was no evidence considered by the Township in creating this ordinance as to whether the Township had a problem with adult entertainment in a liquor licensed facility, it never considered evidence from other townships or cities on this issue, never considered whether the ordinance would have an effect on any alleged adverse secondary effects, and in the words of the Township supervisor, passed this ordinance as a matter of **ministerial action.** This procedure is clearly inconsistent with the approach that majority of the United States Supreme Court in Pap's A.M. espoused, and is inconsistent with the First Amendment. The ordinance was adopted without foundation and consideration of the O'Brien criteria.

III. WHETHER THE ORDINANCE, ON ITS FACE, IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE, CONTRARY TO TRIPLETT GRILLE INC., V. CITY OF AKRON, 40 F. 3d 129 (6TH CIR. 1994)?

The prohibition against nudity in Ordinance 2-16-99(2) applies to all establishments licensed by the Michigan Liquor Control Commission, and the ordinance does not merely ban "true" nudity, but would also prohibit such attire as a dress that, although covering the nipple, has a plunging neckline which exposes any portion of the "breast area" or bikini bathing suit bottom that does not fully cover the "whole" area of the buttocks (i.e. a "thong").[2]

2.This is true of the Public Indecency ordinance as well as the Nudity on Licensed Premises ordinance.

The examples of what can be prohibited under this ordinance, far beyond the area of "adult" entertainment, are almost limitless, but a few selected examples make the constitutional point. Conduct that would be prohibited includes nude and semi-nude "legitimate" theatrical performances (i.e. *Hair, Equus, Oh! Calcutta, Salome*, and *Dance of the Seven Veils*); and just about any opera or chorus line where there can be exposure of the specified body parts "either directly or indirectly, including but not limited to, exposure, **see-through clothing articles or body stockings...**" See Ord. 2-16-99(2) (defining "Nudity").

Most importantly, also prohibited would be any theatrical production, dance review, ballet or opera (in an establishment licensed to serve alcoholic beverages) where there is a bare chested **male** performer, in that **the definition of "nudity" does not distinguish between the male and female breasts**. These are examples of the forms of expressive nudity banned by the charging ordinance.[3]

There are also a myriad of examples of non-expressive nudity that would similarly be prohibited. If a health club has a liquor license (and those that have adjoining restaurants usually do), nudity in the locker room, shower room, or even bathroom is prohibited (an individual will "frequent" or "loiter" in these areas — whatever those terms may mean). **In fact, the exposure of the defined body parts in any bathroom in any bar in Van Buren Township is criminalized.** There are, simply, no exceptions to the scope of this ordinance. Another example would be hotels, most of which have liquor licenses. Any form of

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3. This is limited to the Nudity on Licensed Premises ordinance.

nudity in the entire facility would be banned, including in one's own hotel room. One would hope, of course, that most police and prosecutors would not go after a health club's patrons, theatrical performers, bathroom users, and "PG" rated chorus line dancers, but the legally salient point is that **there is nothing in the ordinance that prohibits them from doing so.**[4] Because this ordinance prohibits a great deal of constitutionally protected expression that has nothing to do with the supposed "secondary effects" of combining alcohol and public nudity, and also bans other forms of non-criminal nudity, the charging ordinance is unquestionably unconstitutional ind impermissible overbroad.

The Sixth Circuit U.S. Court of Appeals has recognized that "the overbreadth doctrine constitutes an exception to traditional rules of standing and is applicable in First Amendment cases in order to ensure that an overbroad law does not act to 'chill' the exercise of rights guaranteed protection." Triplett Grille, Inc. v City of Akron, 40 F. 3d 129, 135 (6th Cir. 1994) (citations omitted). In Triplett, the City of Akron passed a public nudity ordinance, which prohibited a person from knowingly or intentionally, in a public place, appearing in a state of nudity. "Nudity" under that ordinance was defined almost identically to how that term is defined under Ord. 2-16-99(2).

In a ruling that has direct application to the constitutional challenge at issue here, the Sixth Circuit found the Akron ordinance facially overbroad, by stating:

The Akron public decency

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4. See Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 n. 10. 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992).

> ordinance at issue here prohibits all public nudity, including live performances with serious literary, artistic, or political value. The ordinance makes no attempt to regulate only expressive activities associated with harmful secondary effects, and includes no limiting provisions. Instead, Akron's wide ban on public nudity sweeps within its advent, expressive conduct not generally associated with prostitution, sexual assault, or other crimes. As Justice Souter acknowledged in Barnes v. Glen Theatre, Inc., 501 U.S. at 583 n.2: "it is difficult to see, for example, how the enforcement of Indiana statute against nudity in a production of "Hair" or "Equus" somewhere other than adult theatre, would further the state's interest in avoiding harmful secondary effects, in the absence of evidence that expressive nudity outside the context of Renton-type adult entertainment was correlated with such secondary effects.

Triplett, 40 F. 3d at 136 (clarification added).

The same circumstances are at issue here. In any type of theater or opera house where these forms of "legitimate" theatrical performances are presented, and where the establishment is licensed to sell alcoholic beverages, this constitutionally protected form of expression is prohibited. For the same reasons that the law in Triplett was found to be overbroad, Ord. 2-16-99(2) is similarly constitutionally infirm.

Nor is there any difference in the Triplett analysis when the issue of liquor is presented. In a very recent case that is almost identical to the circumstances at issue here, a federal district court found such an "alcohol" regulation to be similarly unconstitutional for the same reasons as noted in Triplett. In J.L. Spoons, Inc. v. O'Connor, 194 F.R.D. 589 (N.D. Ohio 2000), Judge Ann Aldrich, in reaffirming her earlier entry of a preliminary injunction against a "nudity" ban in alcohol establishments as being facially overbread (issued prior to Pap's), stated that "the Supreme Court's recent decision in City of Erie v. Pap's simply does not shed any meaningful light on the overbreadth or vagueness analysis that underpinned this Court's decision to grant Plaintiff's Preliminary Injunction." J.L. Spoons, 194 F.R.D. at 592 (clarification added).

In that court's prior ruling, Judge Aldrich invalidated, as overbroad, an Ohio statute (as opposed to the municipal ordinance here) prohibiting nudity in a liquor license establishment.[5] In analyzing the Sixth Circuit decision in

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5. Rule 52 of the Ohio Liquor Code prohibited nudity which was defined as "a showing (including electronically)" of the human male or female genitals, pubic area or buttocks (anus) with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any

Triplett, she concluded that:

> The prohibition on appearing in a state of nudity contained in sections (a)(3) and (b)(2) is unconstitutionally overbroad for similar reasons. A variety of artistic performances, including the off-cited "Hair" and "Equus" as well as smaller productions like Karen Finley's One Woman Show's, are constitutionally protected and involve nudity. Yet Rule 52 makes no exception for such artistic performances. When a regulation sweeps in performances that fall outside rubric of adult entertainment, the regulation is vulnerable to an overbreadth attack. In fact, the only difference between Rule 52's ban on nudity and the ordinance declared too overbroad in Triplett Grille **is that Rule 52 is limited to venues with liquor licenses. While Rule 52 does not amount to a total ban on public nudity, a ban does not need to be total to be**

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part of the nipple and/or areola, or the showing of the covered male genitals in a discernibly turgid state. J.L. Spoons, Inc., v O'Connor, 190 F.R.D. 433, 436 (N.D. Ohio 1999).

> **substantially overbroad**. The relevant question is whether the regulation "reaches a substantial amount of constitutionally protected conduct," such that the regulation threatens to chill exercise of protected activity."

J.L. Spoons, Inc. v. O'Connor, 190 F.R.D. 433 (N.D. Ohio, 1999) (emphasis added, cites omitted).

The decisions in J.L. Spoons is consistent with the reasoning that the Supreme Court made very clear in Pap's: that nudity regulations could be constitutional only in relation to establishments that engendered "secondary effects." Because Plaintiff did not justify the breadth of his ordinance, it is facially unconstitutional.

In Barnes, the plurality opinion authored by Chief Justice Rehnquist indicated that "Indiana's requirement that the dancer wear at least pasties and g-strings is modest, and the bare minimum necessary to achieve the state's purpose." Barnes, 501 U.S. at 571-72. The Court re-examined and clarified this issue in Pap's, when the four-Justice plurality (and on this issue concurred by Justice Souter, giving a five member majority) stated that "it also may be true that a **pasties and g-string requirement** would not be as effective as, for example, a requirement that the dancers be fully clothed, but the city must balance its efforts to address the problem **with the requirement that the restriction be no greater than necessary to further the city's interest."** Pap's, 120 S. Ct. at 1397 (emphasis added.)

The Court concluded that "the fourth and final O'Brien factor — that the restriction be no greater than is essential to the furtherance of the government interest — is satisfied as well." Id, at 1397. This is because "any incidental impact on the expressive element of nude dancing is de minimis. The requirement that dancers wear **pasties and g-strings** is a **minimal** restriction in furtherance of the asserted government interest, and the restriction leaves ample capacity to convey the daner's erotic message." Id (emphasis added.)

Regardless of whether or not alcoholic beverages are involved, requiring additional clothing beyond pasties and g-strings certainly restricts the ability to "convey the dancer's erotic message," and is therefore impermissibly overbroad, and is not narrowly tailored pursuant to the fourth prong of O'Brien.

Between the decisions of Barnes and Pap's, various courts were confronted with the question of whether the "pasties and g-string" statement in Barnes set a limit. The Michigan Court of Appeals in Jott apparently concluded that it did not. However, the majority of other courts to consider the issue came to the opposite conclusion. In MD II Entertainment, Inc. v. City of Dallas, 935 F. Supp 1394, 1398-99 (N.D. Tex 1995), the district court dealt with a nudity requirement similar but less restrictive than the one at issue here, and determined that "in the instant action, however, the city has gone far beyond a restriction aimed at nudity and a requirement that the dancers wear pasties and g-strings.

The new amendments are directed at the essential expressive nature of Plaintiff's art and are content-based

restrictions." The court also noted that "no evidence indicates that requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects." Id, at 1398 (clarification added).

A similar conclusion was reached in Stevenson v. City of Vicksburg, 900 F. Supp. 1, 11 (S.D. Miss 1994):

> the ordinance before the court today is more restrictive inasmuch as the dancers/entertainers must wear the equivalent of a bikini top and bottom, whereas the dancers in Barnes were only required to wear pasties and g-strings.

The court determined that,

> The city has not met its burden in showing how a lesser degree of nudity furthers its stated interest in curtailing harmful secondary effects. Accordingly, the city's requirement that the dancers/entertainers wear more clothing than pasties and g-strings is not narrowly tailored to support its asserted interest in protecting and preserving the quality of the city's neighborhoods...Id. at 13.

Finally, the court in Nakatomi Investments, Inc. v City of Schenectady, 949 F. Supp 988 (N.D. NY 1997) echoed these conclusions by stating:

> Each additional piece of required clothing must result in a further reduction in pernicious side effects. Without demanding this connection at each step, each additional layer of restriction can be legally added simply on the basis that the previous restriction was valid, until the entire activity is banned, i.e., nude dancing is permitted so long as the dancers wear pasties and g-strings; then bathing suits; then t-shirts; then long pants and a sweater... In recognition o the danger of creeping encroachment, the First Amendment requires, not that the restrictions merely be related to the governmental interest asserted, but rather that each restriction imposed furthers an important or substantial governmental interest. Id. At 997.

The Supreme Court's subsequent decision in Pap's substantiates the correctness of these three decisions, and abrogates Jott on this key issue.

This is further confirmed by the U.S. District Court's decision in Nite Moves Entertainment, Inc. v. City of Boise, 153 F. Supp 2d 1198, 1201 (D. Idaho 2001), where a nudity prohibition similar to the one here was struck down as exceeding the pasties and g-string limit of Pap's and as violative of the fourth prong of the O'Brien test. The court noted it was unaware of a single case that had upheld a similarly restrictive requirement. Id. At 1201, fn 2.

Here, it is clear that the charging ordinance goes well beyond the "de minimis" clothing limitation as set forth in Pap's. A "g-string" or thong bikini cannot be worn by Plaintiff while performing, since it shows the entire buttocks. Similarly, "pasties" could not be worn in Van Buren Township since the "breast area" would not be covered. The Van Buren Township regulation prohibits more forms of expressive entertainment than can be prohibited under the First Amendment pursuant to the decisions of the United States Supreme Court.

CONCLUSION

There are no genuine issues of material fact as it relates to the lack of basis for the adoption of the ordinance as it pertains to suppression of secondary effects and is facially defective as overbroad. Plaintiff is entitled to summary judgment pursuant to F.R. Civ P 56.

Dated:_____ Respectfully Submitted,

_____
Michael L. Donaldson (P35780)
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMANTHA BATES,
Plaintiff,

Honorable Avern Cohn

v.

No. 02-73692

CHARTER TOWNSHIP OF VANBUREN
Defendant.

_____/

HEARING ON DEFENDANT'S MOTION
TO DISMISS

Wednesday, August 20, 2003

Appearances:

Michael L. Donaldson	David J. Szymanski
Attorney at Law	Sommers, Schwartz, Silver
31564 Schoolcraft	2000 Town Center, #900
Livonia, Michigan 48150	Southfield, MI 48075
(734) 261-8140	(248) 355-0300
Attorney for Plaintiff	Attorney for Defendant

Sheri K. Ward, Official Court Reporter
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 219
Detroit, Michigan 48226
(313) 965-4401

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

Detroit, Michigan
Wednesday, August 20, 2003
2:14 p.m.

— — —

THE CLERK: Case Number 02-73692, Bates v. VanBuren Township.

THE COURT: Go ahead, Counsel, what do you want to add to your papers?

MR. SZYMANSKI: Just appearance wise, it's David Szymanski appearing on behalf of the defendant township in both the motion and — well, both motions, Your Honor.

MR. DONALDSON: Mike Donaldson appearing on behalf of --

THE COURT: Do you have anything you want to add, Mr. Szymanski?

MR. SZYMANSKI: Well, they have been briefed extensively. There are a couple of things I would like to just address.

In our opinion there's — as it relates to dismissing the claims brought by the plaintiff, there's been a pretty tight correlation — well, first of all, the matter has been litigated like crazy in both state and federal courts, and I just wanted to embellish a little bit on the kind of correlation or effect that these different litigations involving the same ordinance have had. This case — there was a case filed before Judge Steeh.

THE COURT: I'm familiar with it.

MR. SZYMANSKI: Okay. I would just mention in that opinion, and I quote from it, "since there is a nexus between the claims asserted in the federal action and the defenses or claims asserted or available [which I think is key] in the state court action, abstention is appropriate. For the foregoing reasons, we affirm the district court's judgment dismissing this action."

It then went to the court of Appeals, which upheld everything, and Judge Steeh I just wanted to make sure

Your Honor was aware of that because that came in just about at the time of filing. The Sixth Circuit Court of Appeals upheld Judge Steeh's order to dismiss because they had a proper state forum or the availability of that forum, and they lost in that forum. They lost in the matter before --

THE COURT: You can sit down, sir.

MR. DONALDSON: Okay.

MR. SZYMANSKI: They lost in the matter before the Wayne County Circuit Court. So I just wanted to just emphasize that correlation. The matter has been decided, quite frankly, Your Honor.

The second of the three things I would just embellish on a little bit would be the fact that the plaintiffs ignore, or the plaintiff rather, ignores a key case in both responding to our motion and bringing her own motion, which is the Wojick v. Rimeless Sixth Circuit Court of Appeals opinion, where it says, "It is not even debateable that ordinance is not designed to prevent topless dancing but to address adverse secondary effects which 'are premised on a substantial governmental interest.'"

There was a lot of discussion in brother counsel's pleadings about whether there was a substantial state interest or a substantial governmental interest, and I think if you look at the Wojick decision in correlation with the Pabst decision, which finds combatting adverse secondary effects to be "undeniably important," then that issue is handled.

The last point that I would like to make is a case that brother counsel brought up and devoted considerable attention to in his motion and that is the Triplet Grill decision. The cases — the case before Your Honor now and that in the Triplet Grill decision, I just wanted to point out, aren't even remotely similar. The, the conduct or expressive conduct involved in the Triplet decision had nothing to do with --

THE COURT: Well, you are getting into the

substance, aren't you?

MR. SZYMANSKI: Well, that was the last thing he brought out. He copied us on the decision so I wanted to bring it up. Beyond that, the distinguishable nature of it, there's nothing I would like to add, and I thank Your Honor for your time.

THE COURT: Mr. Donaldson, why should I keep this case if Judge Steeh didn't keep his?

MR. DONALDSON: Because of the Sixth Circuit's decision in Habich v. City of Dearborn, 331 F. 3d 524, in which the Court says, "We are unaware of no case in which a federal plaintiff is deemed to have the 'opportunity' to have his or her federal claim heard in a state proceeding solely because the plaintiff could have amended in existing complain or filed a new complaint in state court. If that were the rule, Younger Abstention would almost always be appropriate because there are few situations in which a federal plaintiff would not be able to file the federal suit in state court."

She is not a party in the state court proceeding. She has a right to bring this federal cause of action here in this Court and have this Court hear it. A state court may have made a decision, but she wasn't a party to that decision and she has a right to have it litigated. She chose this forum to have it heard in. She's not a party to that litigation. She would have to file an amended complaint or go into state court and ask for permission to enter, and therefore, I think she has every right to be in this court.

MR. SZYMANSKI: May I respond, Your Honor?

THE COURT: Thank you. Yeah, briefly.

MR. SZYMANSKI: Well, I would just refer Your Honor back to the opinion of the Sixth Circuit Court of Appeals that involved ultimately the Judge — what I'm calling the Judge Steeh case. You had the plaintiff's employer

at issue in that case, and they — at very end of that opinion of the Sixth Circuit on Page 8 they refer to Gwendolyn Properties and Samuels v. Mackle, a U.S. Supreme Court decision, and then apply that to the situation at hand.

And it says, "Here the Garter Belt [which was the plaintiff at the time] challenges the constitutionality of the same ordinance that VanBuren seeks to enfoce in Garter Belt 1." That was the original case that was filed. "There is a nexus between the claims assertd in the federal action and the defenses or claims asserted or available in the state court action. Abstention thus is appropriate."

And then the Court makes reference back to the Gwendolyn Properties, the Carol, and the Mackle cases, and it says, "For the foregoing reasons, we affirm the district court's judgment."

It's not the same — the issue isn't the same parties. It's almost collateral estoppel in a way, in that they were given the opportunity to litigate this very ordinance in the state case, and they did that. They amended their pleadings and they brought the exact same claims in the state court case that they brought before Your Honor, and in the state court case the opinion of the judge, upon entry of the judgment and permanent injunction, if you will bear with me one second, says that as to those claims, and I'm reading from the seconed last full paragraph, "It is hereby further ordered that for the reasons stated solely on the record the plaintiff encountered defendants [that is, The Garter Belt] the plaintiff here's employer, motion for summary disposition is granted" — I mean that's us rather. "The motion for summary disposition is granted and the counterclaims of the defendant and counterclaim are dismissed with prejudice."

So they had a chance to raise those claims. They raised those claims, and the Sixth Circuit already, not beforehand, but afterwards, found no problem with it. They raised those claims in the state court case. They were

litigated, they were dismissed with prejudice, and the propriety of doing so was validated by the Sixth Circuit Court of appeals opinion in the other Garter Belt case that was filed first in federal court.

THE COURT: Thank you. I'll take it under advisement.

MR. SZYMANSKI: Thank you, Your Honor.

MR. DONALDSON: Your Honor, can I advise the Court of the recent Eleventh, well, Eleventh Circuit decision that was handed down on the 15th called Peekaboo Lounge? I have a copy of it here, and what it addresses, Your Honor, is this.

THE COURT: Just let me have the citation or the case, either one.

MR. DONALDSON: I have got the case for Your Honor.

MR. SZYMANSKI: Do you have a copy for me?

MR. DONALDSON: Yes. One issue that I would like to address to the Court --

MR. SZYMANSKI: Do you have a copy for me?

MR. DONALDSON: Oh, certainly. Sorry.

MR. SZYMANSKI: Thank you.

MR. DONALDSON: In this particular case before the Court according to the deposition testimony there was no pre-enactment study done by anybody in this proceeding. It was all done after the fact the Eleventh Circuit, and so does the Sixth circuit, as I read Christy v. Ann Arbor, 824 F. 2d 489, all require a pre-enactment study. It was not done in this case.

THE COURT: Let me ask you a different question, sir. Is this the first case you as a lawyer have been involved in challenging this ordinance?

MR. DONALDSON: Yes, Your Honor. I was not involved in the other proceedings.

MR. SZYMANSKI: Well, if I could disagree — I won't. If I could -- well, let me point this out, Your Honor,

and I guess I should. First of all, Mr. Donaldson has been involved, if not as an attorney of record, certainly present for virtually all the other matters. Mr. Donaldson individually has filed FOIA requests related to the ordinances and issues in question. Mr. Donaldson has even had his own daughter submit FOIA requests to the Charter Township of VanBuren related to the whole thing. So while his name may appear only on this caption, he's been in and out of these cases from the very beginning, Your Honor, and very actively involved.

MR. DONALDSON: Your Honor, may I respond?

THE COURT: Sure.

MR. DONALDSON: The fact of the matter is I have only showed up in one proceeding and I was not the attorney of record and that was at the contempt proceeding, which Mr. Szymanski — after the entire matter had been litigated and Mr. Hamilton was held in contempt, and I wasn't the attorney of record. Mr. Murphy argued.

Now, I will state for the Court that I am involved in the civil rights action that Mr. Hamilton has that is currently pending before this Court, but I have not litigated any of these ordinances or been involved in any of the ordinances.

THE COURT: Thank you, gentlemen. I'll take the matter under advisement.

MR. SZYMANSKI: Thank you, Your Honor. Will I be given an opportunity to respond to the Peekaboo decision, Your Honor?

THE COURT: Well, the first question — yeah, if you want to, you go ahead. You've got ten days. Everybody gets ten days today.

MR. SZYMANSKI: Okay.

THE COURT: This is the ten-day rule.

MR. SZYMANSKI: Okay. Thank you, Your Honor.

(Proceedings concluded at 2:25 p.m.)

— — —

CERTIFICATION

I, Sheri K. Ward, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

_____/s/_____ 10/15/03

Sheri K. Ward, RPR
Official Court Reporter

ORDER
Entered: June 24. 2004
124831

Michigan Supreme Court
Lansing, Michigan
Marua D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

CHARTER TOWNSHIP OF VAN BUREN,
Plaintiff- Appellee

v.

SC: 124831
COA: 238571
Wayne CC: 00-036479-CZ

GARTER BELT, INC., d/b/a LEGG'S LOUNGE
Defendant- Appellant

_____/

On order of the Court, the application for leave to appeal the September 25, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh and Kelly, JJ., would grant leave to appeal.

80617

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the forgoing is true and complete copy of the order entered at the direction of the Court.

June 24, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHER DIVISION

SAMANTHA BATES
Plaintiff,

vs.

TOWNSHIP OF VAN BUREN
A Municipal Corporation
Defendant.

Case No. 02-73692
Hon. Avern Cohn

_____/

MICHAEL L. DONALDSON (P35780)
Attorney for Plaintiff
31564 Schoolcraft
Livonia, MI 48150
(734) 261-8140

PATRICK B. MCCAULEY (P17297)
DAVID J. SZYMANSKI (P40734
Attorneys for Defendant
Sommers, Schwartz,
Silver & Schwartz, P.C.
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

GREGORY A. ROBERTS (P33984)
Co-Counsel for Defendant
Cummings, Mclorey,
David & Acho, PLC
33900 Schoolcraft
Livonia, MI 48150
(734) 261-2400

MOTION TO LIFT STAY AND ALLOW

SUPPLEMENTAL BRIEFING OF THE SUMMARY JUDGMENT MOTIONS CURRENTLY PENDING

NOW COMES the Plaintiff, SAMANTHA BATES, by and through her attorney, MICHAEL L. DONALDSON and moves that this Honorable Court to left the Stay entered on January 4, 2005 and to allow supplemental briefing of the summary judgment motions that are currently pending for the following reasons:

1. On August 20, 2003 this Court held oral argument on the parties motions for summary judgment.
2. On September 16, 2003 this Court dismissed without prejudice Plaintiff's case based on the Colorado River Doctrine.
3. On January 4, 2005 this Court; modified its Memorandum and Order of Dismissal entered September 16, 2003 to "...the above case is hereby STAYED pending further order of the Court."
4. The Charter Township of Van Buren vs. The Garter Belt, Inc. the parallel proceeding, has been adjudicated and all appeals exhausted. On December 11, 2001 the Wayne County Circuit Court found the nudity ordinance constitutional. On September 25, 2003 the; decision of the lower court was affirmed by the Michigan Court of Appeals in Charter Township of Van Buren v. Garter Belt, Inc., 258 Mich App 594, 609 (2003). On June 24, 2004 the Michigan Supreme Court denied leave to appeal in Case No. 124831.
5. The Garter Belt, Inc. then filed a petition for writ of certiorari to the United States Supreme Court. On November 29, 2004 the Supreme Court denied the writ of certiorari.
6. The state court proceedings are not concluded.
7. Since 16 months have passed since this Court's Memorandum and Order of Dismissal entered September 16, 2003, the plaintiff requests that she be allowed to file a supplemental brief in support of her motion for summary

judgment due to new case law.

WHEREFORE, the plaintiff requests that the stay be lifted, she be allowed to return to federal court and she be allowed to supplement her brief.

_____/S/_____
Michael L. Donaldson (P35780)
Attorney for Plaintiff
31546 Schoolcraft
Livonia, MI 48150
(734) 261-8150

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
APR 15 2805
CLERKS OFFICE
U.S. DISTRICT COURT
EASTERN MICHIGAN

SAMANTHA BATES,
Plaintiff,

vs.

Case No. 02-73692

TOWNSHIP OF VAN BUREN,
Defendant.

HON. AVERN COHN

_____/.

MEMORANDUM AND ORDER GRANTING PLAINTIFF'S MOTION TO LIFT STAY AND ALLOW SUPPLEMENTAL BRIEFING ON SUMMARY JUDGMENT MOTIONS[1]

I. Introduction

This is a civil rights case under 42 U.S.C. § 1983.

1.The Court originally scheduled this matter for hearing. Upon review of the parties' papers, however, the Court finds that oral argument is not necessary. See E.D. Mich. LR 7.1(e)(2).

2. Bates also claims that Township Ordinances 22-106 through 22-112 were unconstitutional. However, as Van Buren Township notes, these ordinances were superceded and replaced by Township Ordinance 02-16-99(2). The only ordinance at issue therefore is Township Ordinance 02-16-99(2), as Bates conceded in her summary judgment papers.

Plaintiff Samantha Bates (Bates) sued defendant Van Buren Township claiming that Township Ordinance 2-16- 99(2)[2], entitled Nudity on Licenses Premises (the Nudity Ordinance), violates her First and Fourteen Amendment rights. Bates is an exotic/ topless dancer at the Garter Belt, Inc. d/b/a Legg's Lounge (the Garter Belt) located in Van Buren Township and licensed to sell alcoholic beverages on its premises.

The parties filed cross motions for summary judgment. Although both parties spent a good deal of effort arguing the merits of the case, the constitutionality of The Nudity ordinance was being considered by the Michigan Court of Appeals in a parallel proceeding by the Garter Belt the establishment where Bates works. Accordingly, the Court dismissed the case without prejudice based on the abstention doctrine in Colorado River Water Conservation Dist. v United States, 424 US, 800 (1976).

Bates appealed. The Court of Appeals for the Sixth Circuit affirmed the decision to abstain, but modified the Court's decision to require a stay of proceedings rather than a dismissal without prejudice. Bates v. Van Buren Township, No. 03-2258 2004 WL 2792483 (6th Cir. Dec. 6, 2004) (unpublished) (per curiam). The mandate issued on December 28, 2004. On January 4, 2005, the Court modified its decision and directed that the case be stayed.

Before the Court is Bates' motion to lift the stay and allow supplemental briefing on the summary judgment motions. For the reasons that follow, the motion is GRANTED.

II. Background

A. The Nudity Ordinance

In 1999. an Buren Township enacted a series of ordinances addressing sexually oriented business, commonly called SOB ordinances. The Nudity ordinance at issue here was one such SOB ordinance, It provides in relevant part follows:

> Nudity on Licensed Premises.
>
> (1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission, No proprietor or operator of any such establishment of any person who violates the provisions of this section.
>
> (2) "Nudity" shall be defined to be the exposure by view of persons of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-thought clothing articles or body stocking:
> (a) the whole or part of the pubic region:
> (b) the whole or part of the anus;

(c) the whole or part of the buttocks;
(d) the whole or part of the genitals;
(e) the breast area including nipple, on more than one-half of the area of the breast.

B. Enforcement Efforts

Dancers at the Garter Belt, including Bates, regularly have exposed theft "breast area including nipple, or more than one-half of the area of the breast" while patrons were served alcoholic beverages both before arid after the Nudity ordinance was enacted, On August 29, 2000, Van Buren Township sent a letter to the owner of the Garter Belt stating that the Garter Belt was in violation of the Nudity ordinance and asked that the violations stop.

C. Count Actions

The Garter Belt apparently did not comply because Van Buren Township filed suit in Wayne County Circuit Court on November 6, 2000, seeking a permanent injunction that would require the Garter Belt to comply with the Nudity ordinance (Garter Belt I) The Garter Belt raised the defense that the Nudity ordinance is unconstitutional

On December 13,2000, the Garter Belt removed the case to federal court where it was assigned to another judge in this district. Charter Township of Van Buren v. The Garter Belt, no, 00-75395.Two weeks later, on December 28, 2000, the Garter Belt filed a case in federal court against Van Buren Township challenging the scheme of Van Buren Township's SOBS, including the constitutional validity of the Nudity ordinance (Garter Belt II). The Garter Belt, Inc. v Charter Township of Van Buren, no. 0-75830. Garter Belt I and Garter Belt II were consolidated and heard before the same

judge.

In Garter Belt I, following an order to show cause, the court remanded the case to Wayne County Circuit Court for lack of subject matter jurisdiction on the grounds that the Garter Belt's federal defenses to the ordinances (that it is unconstitutional) do not provide a basis for federal jurisdiction. See Order Remanding Case to Wayne County Circuit Court For Lack of Subject Matter Jurisdiction and Denying Plaintiffs' Motion to Remand as Moot, filed January 18, 2001, case no. 00-75395.

In Garter Belt II, the court granted Van Buren Township's motion to dismiss on the grounds that the court should abstain from hearing the case in deference to Garter Belt I, which gave the Garter Belt an adequate opportunity to present all of its claims, state and federal, regarding the Nudity ordinance. See Opinion and Order Granting Defendants' Motion to Dismiss, filed June 28, 2001, case no. 00-75630. The Garter Belt appealed the dismissal. the Court of Appeals for the Sixth Circuit affirmed the district courts decision, Garter Belt, Inc. v. Van Buren Township, No. 01-2093, 2003 WL 21277358 (6th Cir. June 2.2003) (unpublished).

Following dismissal of Garter Belt II, the Garter Belt and Van Buren Township continued to litigate Garter Belt I in stated court. On December 11, 2001, the Wayne County Circuit Court entered a Judgment and permanent injunction against the Garter Belt, stating in part that the Nudity ordinance "is without constitutional or legal infirmity" and dismissed the Garter Belt's counterclaims.

The Garter Belt appealed this decision to the Michigan Court of Appeals. On September 25, 2003, the

Michigan Court of Appeals affirmed the circuit court's decision. Charter Township of Van Buren v. Garter Belt Inc., 258 Mich. App. 594 (2003). The Michigan Supreme Court denied leave to appeal. 470 Mich. 880 (2004).

On November 29, 2004 the United States Supreme Court denied certiorari. 125 S. Ct. 620 (2004).

III. Motion to Lift Stay and File Supplemental Briefs

A. Parties' Arguments

Bates says that now that all appeals have been exhausted in the parallel proceeding the stay should be lifted and she should be allowed to file a supplemental brief in support of her motion for summary judgment "due to new case law."

Defendant does not per se oppose the lifting of the stay, but says that Bates' request to supplement with new case law is not well-taken because there is no new case law. Defendant asks the Court to lift the stay and grant its motion for summary judgment previously filed.

In reply, plaintiff says there is new case law since the filing of her motion for summary judgment. She also says that to the extent defendant argues her claims are barred by res judicata, this argument lacks merit because res judicata does not apply since she was not a party to the state court case.

B. Conclusion

Plaintiff may file a supplemental brief within 20 days. Defendant shall file a response to plaintiffs supplemental

brief within 20 days thereafter. Both parties shall address the issue of the impact of the state court's decision on Bates' claims and whether any doctrine(s) bar(s) Bates from litigating her claims in this forum.

The Deputy Clerk shall set the summary judgment motions for hearing after receipt of the parties' supplemental filings.

SO ORDERED.

Dated: **APP 15 2005** /s/
Detroit, Michigan AVERN COHN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMANTHA BATES,
Appellant,

File No: 05-2137

vs.

TOWNSHIP OF VAN BUREN,
a Municipal Corporation
Appellee.

/

MICHAEL L. DONALDSON (P35780)
Attorney for Appellant
31564 Schoolcraft
Livonia, MI 48150
(734) 261-8140

PATRICK B. MCCAULEY (P35780)
DAVID J. SZYMANSKI (P40734)
Attorneys for Appellee
Sommers, Schwartz, Silver &
Schwartz, PC
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

/

MOTION TO REMAND TO DISTRICT COURT OR, IN THE ALTERNATIVE, EXPEDITED APPEAL

NOW COMES Plaintiff, Samantha Bates, by and through her attorney, Michael L. Donaldson, pursuant to 28 U.S.C. 2106, and Rule 27 F.R.A.P., and hereby moves this Honorable court to remand the captioned matter to the District Court for the limited purpose of the District Court having the opportunity to consider the application of this Court's opinions

in Odle v. Decatur County, TN, Docket No 03-6532, decided 8/26/05 and Deja Vu of Nashville v. Metropolitan Government of Nashville, Docket No 03-6521, decided 8/31/05, or in the alternative, to grant Appellant an expedited appeal and shows unto this Honorable Court as follows:

1. This appeal could be aptly called Bates II. On December 6, 2004, this Court issued an unpublished opinion, Docket No. 03-2258, (Exhibit 1), instructing the District Court to modify its Order of Dismissal, issued September 16, 2003, pursuant to Colorado River Water Conserv. Dist. v. U.S., 424 U.S. 800 (1976), with an Order of Stay of Proceedings pending final resolution of Charter Township of Van Buren v. Garter Belt, Inc., 258 Mich App 597 (2003), which at that time was pending before the United States Supreme Court. On November 29, 2004, the Supreme Court denied Writ of Certiorari.

2. In this Court's December 6, 2004 decision, this Court stated, at page 10:

> Because *Colorado River* abstention is temporary, federal courts will often eventually hear a case they have abstained from deciding. *Colorado River* abstention is temporary because all the reasons for it dissipate once the state court proceedings have run their course. At that point, if any party still has a claim for which it is entitled to a federal forum, and it is not barred by *res judicata* or a similar doctrine, it may return to federal court. Because, under *Colorado River* abstention, the parties in the state and federal proceedings need not be identical, the federal suit will normally not be barred by *res judicata* and federal litigation may resume if the state courts do not moot the issue on state law grounds. (Fn 2)

In fn 2 of this paragraph, this Court stated, addressing the issue of "state law grounds", as follows:

> This is in contrast to *Younger* [*v. Harris*, 401 U.S. 37 (1971) abstention, which blocks federal suits seeking to enjoin state criminal proceedings and hence only applies to proceedings between the same parties. 401 U.S. at 38-46. Hence, in *Younger* abstention cases, the parties will almost always be barred by *res judicata* from relitigating in federal court

3. On remand, the District Court, on January 4, 2005, entered an Order Modifying the Order of September 16, 2003 to read that the captioned matter "is hereby stayed pending further order of the Court." (Exhibit 2).

4. Plaintiff, on or about January 14, 2005, filed a Motion to Lift Stay and Supplement Briefing of the Motions for Summary Judgment Currently Pending, (Exhibit 3) which was granted on April 15, 2005. (Exhibit 4) The parties had filed cross motions for summary judgment or partial summary judgment in May, 2003. The trial court permitted Plaintiff and Defendant to supplement their briefs with Plaintiff's supplemental brief due in 20 days and Defendant's supplemental brief 20 days thereafter. In addition, the District Court instructed both parties as follows: "Both parties shall address the issue of the impact of the state court's decision on Bates' claims and whether any doctrine(s) bar)s) Bates from litigating her claims in this forum." (Exhibit 4, p 5). Both parties complied.

5. Oral argument on the motions for summary judgment was scheduled for July 27, 2005. (Exhibit 5). However, on July 25, 2005, the Court notified the parties that oral argument would not be heard and issued its opinion and

order granting Defendant's Motion for Summary Judgment and dismissing the action on the grounds of *res judicata*. (Exhibits 6 and 7).

6. Pursuant to Eastern District of Michigan Local Rule 7.1(g), a motion for rehearing must be filed not later than 10 days after entry of judgment. Pursuant to Rule F.R. Civ. P 6, August 8, 2005 was the last day when Appellant could file a Motion for Reconsideration.

7. Plaintiff, on July 28, 2005, filed a Notice of Appeal, (Exhibit 8).

8. On August 26, 2005, approximately 3 weeks after Appellant's last day for filing a Motion for Reconsideration, this Court, in a published opinion, handed down its decision in Odle, supra. In Odle, this Court held that the Decatur County ordinance regarding adult entertainment was "unconstitutionally overbroad." Appellant submits that the Van Buren Township ordinance is similarly overbroad. However, Appellant has not had an opportunity to address the merits, including "overbreadth."

9. Five days after this Court's decision in Odle, this Court issued its published opinion in Deja Vu of Nashville, Inc., supra. When Deja Vu is read in conjunction with Odle, Appellant believes that the Odle holding is retroactive. Certainly, without question, it is prospective. The effect of the decision in Odle, as discussed more fully hereinafter, rejects the foundation and holding in Charter Township of Van Buren v. Garter Belt, Inc. 258 Mich App 594 (2003) as it pertains to overbreadth. *Res judicata* does not apply to the issue of prospective application of Odle and *res judicata* was

the sole basis of the District Court granting summary judgment in favor of Appellee. Further, if as Appellant believes, Odle has retroactive application, *res judicata* did not apply in the first instance.

10. The complaint in Bates was filed nearly three years ago, to the day. The District Court did not address the merits, but nearly a year after the complaint was filed, concluded that the Van Buren Township v. Garter Belt required abstention, stating in its opinion (Exhibit 10):

> The state court first assumed jurisdiction in *Garter Belt I.* While the source of the law is federal, the state courts have concurrent jurisdiction over federal constitutional issues. Indeed, another judge in this district and the Sixth Circuit recognized as much in dismissing *Garter Belt I* on other abstention grounds in part because Garter Belt's ability to raise all of its federal claims in state court. Important also is the fact that the resolution of state law issues in *Garter Belt I* may render federal constitutional rulings unnecessary. Finally, complete relief is available in state court as both the Garter Belt and Bates seek the same relief - a ruling that the Nudity ordinance is unconstitutional.

This Court rejected the District Court's dismissal and ordered that this case be stayed pending final resolution of Garter Belt in the Supreme Court. However, upon remand, the District Court again dismissed Bates' claim, although she was not a party to Garter Belt, not an employee and not in privity with Garter Belt, on the grounds of *res judicata*. As set forth above, Appellant believes that the holding in Odle would require the District Court to hold the Van Buren Township ordinance unconstitutional and issue a permanent

injunction.

11. If this Court does not remand, an expedited appeal is necessary so that Bates can present the issue of overbreadth to the District Court in the most expeditious manner. If remand is not granted, Appellant will not be able to argue the merits of the overbreadth issue to this Court because it has not been first presented to the District Court, except to argue that the District Court erred in granting *res judicata* where the issue of overbreadth had been raised in Appellant's complaint in the District Court and was not addressed by the District Court when finding that *res judicata* applied.

12. There are no transcripts of any proceedings after this Court's remand and an expedited appeal, if this Court denies remand, will permit Appellant to present her issues to the District Court in the most expeditious manner.

ARGUMENT AND LAW

Samantha Bates, by the holdings of the District Court, been deprived, in totality, of her right to have access to a federal forum to determine application of her First Amendment rights. She was not a party to the state Van Buren v. Garter Belt litigation. Van Buren Township was the plaintiff and it sued Garter Belt. It did not sue Samantha Bates. She was not given notice of the litigation and was at no time relevant an employee of the Garter Belt. Samantha Bates is self employed as an exotic dancer. She was never given an opportunity to be a party.

Samantha Bates was never represented by the counsel that appeared in Van Buren v. Garter Belt in the Oakland County Circuit Court. However, the District Court in this case determined that because she sought the same results that Garter Belt sought, she was precluded from pursuing her own personal

interest and constitutional protections.

The decision by the Michigan Court of Appeals in Van Buren v. Garter Belt, supra, was based primarily on its prior decision in Jott, Inc. v. Clinton Charter Twp., 224 Mich App 513, 548; 569 NW 2d 841 (1997), stating that it was bound by Jott. 234 Mich App at 609. Addressing the federal constitutional issues, the Michigan Court of Appeals wrote:

> Defendant [Garter Belt] argues that the trial court erred by applying rational basis scrutiny to liquor control laws as employed by the Jott Court in reliance on California v. LaRue, 409 U.S. 109; 93 S.Ct. 390; 34 L.Ed. 2d 342 (1972), and its progeny. LaRue held that the Twenty-first Amendment conferred broad powers on the states to regulate sexually explicit entertainment in establishments licensed to sell alcoholic beverages. In particular, defendant argues that Jott has been superseded by subsequent decisions of the United States Supreme Court, including 44 Liquormart, Inc. v Rhode Island, 517 U.S. 484; 116 S.Ct. 1495; 134 L.Ed 2d 711 (1996), and City of Erie v. Pap's A M, 529 U.S. 277; 120 S.Ct. 1382; 146 L.Ed 2d 265 (2000), which applied intermediate scrutiny established in United States v. O'Brien, 391 U.S. 367; 88 S.Ct. 1673; 20 L.Ed. 2d 672 (1968), for expressive conduct protected by the First Amendment. We disagree. Jott, supra, binds this Court. MCR 7.215(J)(1). The United States Supreme Court has not clearly repudiated, either in 44 Liquormart, supra, or Pap's, supra, the underlying premise of LaRue and its progeny that a state may, in the exercise of its inherent police powers, constitutionally regulate appropriate places where liquor may be sold,

> including prohibiting nudity at licensed to sell alcohol establishments.
>
> * * *
>
> This Court, relying on LaRue and [New York State Liquor Auth. v.] Bellanca, [452 U.S. 714 (1981)] applied rational basis scrutiny to a First Amendment challenge to a Clinton Township ordinance identical in pertinent parts to plaintiff's ordinance. Jott, supra at 538. The Jott Court found that the parts of the Clinton Township ordinance identical to the Van Buren Township ordinance at issue here were rationally related to the legitimate governmental interest of eradicating the effects of "undesirable behavior" stemming from a combination of alcohol and nudity. Id. at 546, quoting Bellanca, supra at 718, quoting the legislative memorandum relied on in Bellanca. After severing invalid parts of the ordinance, this Court held "the remainder of the ordinance constitutionally valid and enforceable." Jott, supra at 548.

The Michigan Court of Appeals, as it related to overbreadth, wrote as follows:

> Our conclusion is further supported by the presumption of constitutional validity, Burns [v. Detroit (On Remand), 253 Mich App 608; 660 NW 2d 85 (2002), mod 468 Mich 881 (2003)], supra at 627-628, and by the binding precedent of Jott, supra. Plaintiff's ordinance is identical to the ordinance held constitutional in Jott after this Court severed parts of the ordinance not reasonably related to the legitimate governmental interest involved. Id. at 548. Although Jott did not extensively analyze the

> overbreadth issue, it reversed the trial court's determination that Clinton Township's ordinance was constitutionally overbroad. Jott, supra at 537, 548. Under MCR 7.215(J)(1), the Jott court's rejection of an overbreadth challenge binds this Court.

This Court, in Odle, found overbreadth and addressed the issue of the application of LaRue, supra. This Court found:

> LaRue's rationale is no longer good law. In 44 Liquormart, Inc. v Rhode Island, 517 U.S. 484 (1996), the Court "disavow[ed] [LaRue's] reasoning insofar as it relied on the Twenty-First Amendment." Id at 516. The Court held "that the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." Id LaRue's holding survived Liquormart because, as the Court noted: "in...cases [subsequent to LaRue], the Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of 'bacchanalian revelries' described in the LaRue opinion regardless of whether alcoholic beverages are involved." Id at 515. The Court cited Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) and Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (plurality opinion) for this proposition -- two cases in which it had applied intermediate scrutiny to laws designed to remedy harmful secondary effects. A number of courts have interpreted Liquormart's reaffirmation of LaRue's holding to mean that the LaRue regulations would have survived intermediate scrutiny – and, moreover, that they would have

had to survive such scrutiny to comport with the First Amendment. Carandola, 303 F. 3d at 513 n.2, 519-20; Dream Palace v. County of Maricopa, 384 F. 3d 990, 1018-19 (9th Cir. 2004); Sammy's of Mobile, LTD v. City of Mobile, 140 F. 3d 993, 996 (11th Cir. 1998); Ben's Bar, Inc. v Village of Somerset, 316 F. 3d 702, 710-11 (7th Cir. 2003). But see Carandola, 303 F. 3d at 421023 (Niemeyer J., dissenting); BZAPS, Inc. v City of Mankato, 268 F. 3d 603, 608 (8th Cir. 2001) (following LaRue without applying intermediate scrutiny in a case that did not involve an overbreadth claim.)

As set forth above, the core of Van Buren v. Garter Belt is not good law.[1] According to the following case law, the District Court must be first given the opportunity to address the impact of Odle and Deja Vu on its decision to dismiss on the basis of *res judicata*.

Citing Cissel Mfg Co. v. U.S. Dep't of Labor, 101 F. 3d 1132, 1136 (6th Cir. 1996), this Court, in Citizens Against Pellissippi P. Ext. v Mineta, 375 F. 3d 412 (6th Cir. 2004), stated: "A remand is generally required if the intervening event may affect the validity of the....action." Also see Ethel Corp. v

---

1. It is Bates' position that Jott, as this Court has so found, was bad law when the Supreme Court decided 44 Liquormart. The Michigan Court of Appeals rejected the reasoning followed by this Court in upholding the Van Buren ordinance in Garter Belt. The District Court never permitted an independent third party whose personal constitutional rights were affected to present her argument, thus resulting in a second appeal. If remand is not accorded Appellant, it is likely that there will be a third appeal with the loss of judicial economy for the District Court and this Court.

Browner, 989 F. 2d 522 (DC Cir. 1993). Cissel, supra, involved a governmental agency, but the reasoning is applicable to the District Court. In Ethel, the court stated: "[w]e commonly grant such motions, preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete."

Where there has been a change in the law, as in this case, the proper procedure to be followed is to remand the case to the District Court with instructions for further proceedings. Tinker Nat Bank v. Union Sav. Bank, 400 F 2d 771 (1968). In Guste v. Jackson, 429 U.S. 399 (1997), the Supreme Court, in a brief, terse statement, remanded a writ of certiorari back to the Court of Appeals so that it may consider a supervening decision by the Supreme Court.

In U.S. v. Moore, 131 F. 3d 595 (6th Cir. 1997), this Court, citing 28 U.S.C. 2106 and U.S. v. Young, 66 F. 3d 830, 835 (7th Cir. 1995), stated that appellate courts are provided "with authority to grant general or limited remands." In Moore, this Court stated:

> While we recognize that this court has in the past and will continue in the future to issue general remands, there are times when judicial economy favors limited remands. As the [U.S. v]Santonelli [128 F. 3d 1233 (8th Cir. 1997)] court reasoned: "Repetitive hearings, followed by additional appeals, waste judicial resources...and on hardworking district and appellate judges...Ordinarily, an appeals court can avoid the problem of multiple appeals by issuing specifically limited remands...."

In U.S. v. Barnett, 398 F. 3d 516 (6th Cir. 2005), Judge Gwin, in his concurring opinion, wrote:

Dated:_____

Respectfully Submitted,

_____

Michael L. Donaldson (P35780)
Attorney for Appellant
31564 Schoolcraft
Livonia, MI 48150
(734) 261-8140

Court Rules of 1985
CHAPTER 2. CIVIL PROCEDURE
SUBCHAPTER 2.200 OF PARTIES; JOINDER OF CLAIMS AND PARTIES; VENUE; TRANSFER OF ACTIONS

RULE 2.205 NECESSARY JOINDER OF PARTIES

(A) Necessary Joinder. Subject to the provisions of subrule (B) and MCR
3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

(B) Effect of Failure to Join. When persons described in subrule (A) have not been made parties and are subject to the jurisdiction of the court, the court shall order them summoned to appear in the action, and may prescribe the time and order of pleading. If jurisdiction over those persons can be acquired only by their consent or voluntary appearance, the court may proceed with the action and grant appropriate relief to persons who are parties to prevent a failure of justice. In determining whether to proceed, the court shall consider

(1) whether a valid judgment may be rendered in favor of the plaintiff

in the absence of the person not joined;

(2) whether the plaintiff would have another effective remedy if the action is dismissed because of the nonjoinder;

(3) the prejudice to the defendant or to the person not joined that may result from the nonjoinder; and

(4) whether the prejudice, if any, may be avoided or lessened by a protective order or a provision included in the final judgment.

Notwithstanding the failure to join a person who should have been joined, the court may render a judgment against the plaintiff whenever it
is determined that the plaintiff is not entitled to relief as a matter of substantive law.

(C) Names of Omitted Persons and Reasons for Nonjoinder to Be Pleaded. In a pleading in which relief is asked, the pleader must state the names, if known, of persons who are not joined, but who ought to be parties if complete relief is to be accorded to those already parties, and must state why they are not joined.

[Effective March 1, 1985.]

United States Constitution
AMENDMENTS

Amendment I. Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

BEST AVAILABLE COPY

United States Constitution
AMENDMENTS

Amendment IV. Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

United States Constitution
AMENDMENTS

Amendment V. Criminal actions — Provisions concerning — Due process of law and just compensation.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution
AMENDMENTS
Amendment XIV.

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§ 1. Citizenship — Due process of law Equal protection.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code
TITLE 28 — JUDICIARY AND JUDICIAL PROCEDURE
PART V — PROCEDURE
CHAPTER 133 — REVIEW — MISCELLANEOUS PROVISIONS

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28 U.S.C. § 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review,and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(June 25, 1948, ch. 646, 62 Stat. 963.)

United States Code
TITLE 42 — THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 — CIVIL RIGHTS
SUBCHAPTER I — GENERALLY

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Code
TITLE 28 — APPENDIX
FEDERAL RULES OF CIVIL PROCEDURE
VII. JUDGMENT

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be se.ved at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July
1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

Supreme Court, U.S.
FILED
061220 FEB 12 2007
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT
OF THE UNITED STATES

SAMANTHA BATES
Petitioner,

v.

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

Michael L. Donaldson (P35780)
Attorney for Petitioner
31564 Schoolcraft Rd.
Livonia, Michigan 48150
(734) 261-8140

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BATES v. TOWNSHIP OF VAN BUREN, 459 F.3d 731 (6th Cir. 2006)

Samantha BATES, Plaintiff-Appellant, v, TOWNSHIP OF VAN BUREN,

Defendant-Appellee.

No. 05-2137.

United States Court of Appeals, Sixth Circuit.

Argued: July 20, 2006.

Decided and Filed: August 21, 2006.

Petition for Rehearing Denied En Banc, November 13, 2006.

Appeal from the United States District Court for the Eastern
District of Michigan, Avern: Cohn, J.

ARGUED: Michael L. Donaldson, Livonia, Michigan, for Appellant. James N. McNally, Sommers Schwartz, Southfield, Michigan, for Appellee. ON BRIEF: Michael L. Donaldson, Livonia, Michigan, for Appellant. James H. McNally, Patrick B. McCauley, David J. Szymanski, Sommers Schwartz, Southfield, Michigan, for Appellee.

Before: GILMAN and COOK, Circuit Judges; DOWD, District Judge. [fn*]

COOK, J., delivered the opinion of the court, in which

DOWD, D.J., joined.

GILMAN, J. (pp.731-39), delivered a separate dissenting opinion.

[fn*] The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

COOK, Circuit Judge.

Samantha Bates, a topless dancer at Leggs Lounge in the Township of Van Buren, Michigan, filed this § 1983 action challenging a town ordinance that prohibited nudity at "any establishment licensed or subject to licensing by the Michigan Liquor Control Commission." The district court stayed her case until the Michigan Court of Appeals - in an action to enjoin the bar's owner, The Garter Belt, Inc., from violating the ordinance - rejected the defense that the ordinance was unconstitutional. The district court then lifted the stay on this case and dismissed Bates's claims as res judicata. We find that the district court correctly applied the Michigan law of res judicata, and we accordingly affirm.

I.

On March 2, 1999, the Township of Van Buren enacted Ordinance 2-16-99(2), providing as follows:

> Nudity on Licensed Premises.
>
> (a) No person, while appearing in a state of nudity as defined by this section, shall frequent,

loiter, work for, or perform in any establishment licenced or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the Provisions of this section.

(b) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:

(1) the whole or part of the pubic region;

(2) the whole or part of the anus;

(3) the whole or part of the buttocks;

(4) the whole or part of the genitals;
(5) the breast area including nipple, or more than one-half of the area of the breast.

In November 2000, the township sought a permanent injunction requiring The Garter Belt to comply with the ordinance ("Garter Belt I"). The bar removed the case to federal court and filed a separate federal case challenging the constitutionality of the ordinance ("Garter Pelt 11"). The district court remanded Garter Belt I and abstained from (and dismissed) Garter Belt II on the basis of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and in doing so rejected The Garter Belt's argument that abstention was inappropriate because it would preclude, at least until a writ of certiorari was granted by the Supreme Court, federal review of its constitutional claims. After the Sixth Circuit affirmed, Garter

Belt I was heard in state court. The Wayne County Circuit Court upheld the statute's constitutionality and issued a permanent injunction against the bar; the Michigan Court of Appeals affirmed, Charter Twp. of Van Buren v. Garter Belt, Inc., 258 Mich, App, 594, 673 N.W.2d 111 (2003), and the Michigan Supreme Court denied leave to appeal, 410 Mich, 880, 682 N.W 2d 86 (2004) - The United States Supreme Court denied certiorari. 543 U.S. 1002, 125 S.Ct. 620, 160 L.Ed.2d 462 (2004)

While the Garter Belt I litigation was proceeding, Bates filed this 42 U.S.C. § 1983 action in federal district court challenging the constitutionality of the ordinance. The case was stayed until certiorari was denied in Garter Belt I. The court then lifted the stay and requested briefing on "the impact of the state court's decision [in Garter Belt I] on Bates's claims and whether any doctrine(s) bar(s) [Bates] from litigating her claims in this forum."

The district, court barred Bates's action as res judicata. Although different parties were involved in the actions, in Michigan res judicata bars a subsequent action by the "same parties or their privies." Adair v. State, 470 Mich. 105, 680 N.W.2d 386, 396 (2004). The court held that Bates and The Garter Belt were in privity in part because they had a " substantial identity of interests'" - specifically, "the: the ordinance be struck down on constitutional grounds." Id. (citation omitted). Bates timely appealed. [fnl]

II.

The application of res judicata is a question of law that we review de novo. Browning v. Levy, 283 F.3d 761, 772 (6th Cir. 2002).

The "Full Faith and Credit statute," 28 U.S.C. § 1738, [fn2] requires federal courts in a § 1983 action to give state court judgments the same preclusive effect those judgments would have in the rendering state's courts. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 80-82, 104 S.Ct. 892, 79 L.Ed. 2d 56 (1984) - The Michigan Supreme Court "has taken a broad approach to the doctrine of res judicata," determining that it "bars a second, subsequent action when (l) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was or could have been, resolved in the first." Adair, 680N,W.2d at 396. The doctrine "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." Id.

Bates challenges only the district court's finding that she is in privity with The Garter Belt.

> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. The outer limit of the doctrine traditionally requires both [1] a "substantial identity of interests' and [2] a "working functional relationship" in which [3] the interests of the nonparty are presented and protected by the party in the litigation. Id. (citations omitted)

In Adair, the Michigan Supreme Court barred as res judicata a challenge by taxpayers and school districts to the state's education funding plan. The Michigan Constitution required that the state neither (1) decrease its funding for mandate activities and services nor (2) impose new unfunded

mandates on local school districts. After several rounds of litigation concerning the first requirement, a new group of plaintiffs, including some school districts and taxpayers that had not been party to the first litigation, challenged the state funding plan as not complying with the second requirement. The Michigan Supreme Court dismissed the subsequent claims on the ground that they could have been reached in the earlier suit.

The court held that the plaintiffs who were not parties in the earlier litigation had "identical" interests to those who were because each sought the same declaratory relief.

> In litigation concerning the [Michigan Constitution's educational funding provisions], where a taxpayer or a local unit of government is suing the state, the issue is whether the Legislature's act is unconstitutional as it applies not just to a single local unit of government, but to all local units affected by the legislation. In such cases, the interests of all similar local units of government and taxpayers will almost always be identical. If the relief sought by one plaintiff to remedy a challenged action is indistinguishable from that sought by another, such as when declaratory relief is sought concerning an act of the Legislature establishing the proportion of state funding for local government units, the interests are identical.

Id. (emphasis added). Notwithstanding that the second group of plaintiffs were challenging the funding plan under a different constitutional provision, the court held that privity existed because each group of plaintiffs sought to have the state's funding plan declared unconstitutional.

The court in Adair did not explain how the parties maintained a "working functional relationship," the second component of the test for privity, and thus it is hard to see what force the requirement retains. (In contrast, the court did summarily assert that the interests of the nonparty were "presented and protected in the first litigation, the third component of the test for privity. Adair cited Phinisee v. Rogers, 229 Mich.App. 547 582 N.W.2d 352, 85-55 (1996), in which the court held that an illegitimate child's paternity claim was not barred as res judicata by her mother's failed paternity suit because the mother and daughter did not share a substantial identity of interests.[fn3J The court in Phinisee quoted a definition of privity in which the parties' having an actual relationship was a disjunctive requirement from their having an identity of interests:

> [Privity consists in] mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right. [It] signifies that [the] relationship between two or more persons is such that a judgment involving one of them may justly be conclusive upon [the] other, although [the] other was not a party to lawsuit.

Black's Law Dictionary 1199 (6th ed. 1990) (emphasis added) [fn 4] Though it is not essential to our holding, we are confident that Adair' s requirement of a "working functional relationship" may be satisfied by "an identification of interest of one person with another as to represent the same legal right." Id.

Bates's case satisfies each of the components discussed in Adair. First, Bates and The Garter Belt had a substantial identity of interests because each sought a facial invalidation of the ordinance. It is of no moment that The Garter Belt was a

defendant in the earlier action whereas Bates is a plaintiff here; Adair speaks of "interests," and offers only as an example of parties with identical interests those who seek the same relief. Accordingly, Adair has often been invoked to bar later actions by parties who were previously defendants (or their privies) notwithstanding that they sought no relief in the earlier cases. See, e.g., Reed V. City of Detroit, 2005 WI 176665, No. 247557, 2005 Mich. App. LEXIS 172 (Mich.Ct.App. Jan. 27, 2005) (unpublished) (barring action by a subsequent owner - i.e., a privy of the prior owner - against the city based upon earlier tax foreclosure action against the prior owner). Nor do Bates's interests diverge from The Garter Belt's because she seeks damages in addition to declaratory relief. The only basis she alleges for such damages is the ordinance's facial unconstitutionality, so the substance of her complaint remains on all fours with The Garter Belt's defense in the earlier action. Second, Bates and The Garter Belt, the only club where she danced, had no less a "working functional relationship" than did the parties considered in Adair. Third, Bates's interests were presented and protected by The Garter Belt in the previous litigation. Had The Garter Belt avoided the injunction in any way, Bates would have been free to dance as she had before the ordinance's passage. And had The Garter Belt prevailed in its defense that the ordinance was facially unconstitutional, Bates would have had no reason to seek the same declaration.

Indeed, the case for privity is stronger here than it was in Adair, as Bates not only seeks the same declaration that the Michigan courts refused to make, but also prays for that relief with arguments identical to those that the Michigan courts rejected. In Garter Belt I, The Garter Belt opposed the injunction by arguing (among other things) that "the township's prohibition of nudity in establishments that serve alcohol [was] unconstitutionally overbroad." 673 N.W2d at 132.

And, as Bates's briefs make clear, and as her counsel confirmed at oral argument, Bates's only challenge is that the ordinance is overbroad. The Michigan courts rejected The Garter Belt's arguments that the ordinance would improperly prohibit plunging necklines, thong bikinis, and semi-nude theatrical performances such as Hair, Oh! Calcutta, Salome, and Dance of the Seven Veils. 673 N.W.2d at 132-34. Bates now asks this court to find the ordinance unconstitutional because it would prohibit plunging necklines, thong bikinis, and Hair, Oh! Calcutta, Salome, and Dance of the Seven veils. (See Bates Br. 33.) There is simply no way to consider her arguments without revisiting the very matter the Michigan courts decided and the United States Supreme Court refused to review.

Finally, we reject Bates's two arguments contesting the application of the doctrine of res judicata to bar her claims. First, Bates contends that in Dearborn Heights Sch. Dist. V Wayne County MEA/NEA, 233 Mich.App. 120, 592 N.W.2d 408 (1998), Michigan adopted the rule expressed by this court in Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 43 F.3d 1054, 1070 (6th Cir. 1995), that res judicata requires "the existence of an express or implied legal relationship in which the parties to [the] first suit are accountable to the nonparties who file a subsequent suit raising identical issues." Dearborn Heights, however, was published six years before Adair and cited Becherer only for the generic proposition that "a nonparty to an earlier proceeding will be bound by the result if that party controlled the earlier proceeding or if the party's interests were adequately represented in the original matter." 592 N.W.2d at 412. And Becherer itself did not purport to interpret Michigan law. Adair is the operative precedent, and it does not require there be an "express or implied legal relationship" making one party accountable to the other before an action is barred as res judicata.

We also reject Bates's contention that her claim should not be barred because her interests were not "actually presented" in Garter Belt I. As noted above, we see no daylight between Bates's interests - as expressed in this overbreadth challenge - and those represented by The Garter Belt in its defense that the statute was unconstitutionally overbroad. Moreover, if Bates's complaint is that particular arguments were not raised in the prior litigation, then it may be rejected on the ground that res judicata "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." Adair, 680 N.W 2d at 396. We remain convinced that Bates's interests were presented and protected in the prior litigation.

As a final point, we note that Bates has not challenged Michigan's res judicata doctrine as unconstitutional under Richards v. Jefferson County, 517 U.S. 793, 116 S,Ct. 1761, 135 L.Ed.2d 75 (1996). In Richards, the Court held that a state court's "extreme" application of state res judicata principles to bar a "stranger" to a previous judgment from pursuing her constitutional claims deprived that party of Fourteenth Amendment due process. 517 U.S. ,at 797, 802, 116 S.Ct. 1761. Richards did not concern a series of facial challenges, so it is quite possibly distinguishable from this case. Either way, the issue is not properly before the court, as Bates has not raised the argument.

III.

We affirm. the district court's dismissal of Bates's action a res judicata under Michigan law. Bates's case is ultimately doomed by the federalism interests expressed in the Full Faith and Credit statute, 28 U.S.C. § 1738, and, as the Supreme Court has recently reiterated, federal courts may not fashion exceptions to § 1738 to provide a federal forum to plaintiffs

who otherwise would be without one. See San Remo Hotel v. City and County of San Francisco, 545 U.S. 323, 125 S.Ct. 2491, 162 L.Ed. 2d 315 (2005).

[fn1] On November 15, 2005, a panel of this circuit denied Bates's motion to remand her case to the district court for reconsideration in light of Odle v. Decatur County, Tennessee, 421 F. 3d 386 (6th Cir. 2005), and Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson County, Tennessee, 421 F. 3d 417 (6th Cir. 2005). Bates v. Twp. of Van Buren, No. 05-2137 (6th Cir. Nov. 15, 2005). The panel noted, "Upon consideration, we conclude this argument [regarding Odle or Deja Vu] should be presented as part of the merits of this appeal." In Odle, the court struck down as unconstitutionally overbroad a Tennessee county ordinance that "prohibit[ed] nudity and sexually suggestive conduct at a wide range of public places where alcohol is sold, served, or consumed" on the ground that the county failed to support the breadth of the ordinance, 421 F. 3d at 388. In Deja Vu, the court affirmed the principle that Odle should be given retroactive effect in all cases on direct review. 421 F. 3d at 420. Neither case concerned Michigan's res judicata rules. Because we affirm the district court's judgment on that basis, we do not address Odle, Deja Vu, or in any other way the merits of Bates's claims.

[fn2] "the records and judicial proceedings of any court of any such state...shall have the same full faith and credit in every court within the United States...as they have by law or usage in the courts of such State...from which they are taken."

[fn3] See Phinisee, 582 N.W. 2d at 855 ("We also agree with those courts that have recognized that an illegitimate child's interests in establishing paternity, which may extend not only to immediate support payments but also to future social security benefits and inheritance through the biological father, differ from

the mother's interests in establishing paternity, which may be focused more on immediate financial concerns.").

[fn4] In contrast, the Fourth Edition defined privity as simply "Mutual or successive relationships to the same rights of property." Black's Law Dictionary 1361 (rev. 4th ed. 1968).

RONALD LEE GILMAN, Circuit Judge, dissenting.

The majority's decision in this case leads to an unnecessarily broad and perverse result - that once the Michigan courts have determined that a state statute complies with the federal Constitution, the federal courts are precluded from ever passing on the issue. In applying Michigan's res judicata principles, the majority extends the case of Adair v. State of Michigan, 470 Mich 105, 680 NW 2d 386 (2004), to encompass any plaintiff who mounts a facial challenge to The Township's nudity ban. Although I agree with the majority that we must apply Michigan's res judicata principles, I disagree with the majority's interpretation of Adair. I do not believe that all subsequent plaintiffs who might wish to challenge the Township's nudity ordinance should be precluded on the basis of res judicata from seeking a federal ruling on whether the ordinance violates the First Amendment. The majority's holding is especially unsatisfying in this case because this circuit has recently held that a similar Tennessee nudity ban was unconstitutionally overbroad. See Odle v. Decatur County, Tennessee, 421 F. 3d 386 (6th Cir. 2005) (overturning an ordinance that "prohibits, among other things, nudity and the performance of a wide range of arguably sexually suggestive acts in 'public places where intoxicating liquors are offered for sale, served or consumed.'").

In Adair, the Michigan Supreme Court held that privity requires a "'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented

and protected by the party in the litigation." 680 NW 2d at 396. Applying this test, the Adair Court held that similarly situated school districts and taxpayers were in privity because they all sought to "establish[] the proportion of state funding for local government units" and to ensure that "mandated activities are funded as they are required to be under the Headlee Amendment." Id. at 396-97 (italics omitted).

The majority in the case before us interprets Adair to stand for the proposition that all plaintiffs who facially challenge the same ordinance are in privity for res judicata purposes. See Maj. Op. At p. 736 ("Bates and The Garter Belt had a substantial identity of interests because each sought a facial invalidation of the ordinance.") It also denigrates the "working functional relationship" prong of Adair by commenting that "it is hard to see what force the requirement retains," Maj. Op. at p. 735, and conflates the two prongs of Michigan's test for privity by allowing the "relationship" prong to "be satisfied by an identification of interest of one person with another as to represent the same legal right." Id. (Citation and quotation marks omitted.)

I do not believe that the majority has properly interpreted Adair. In Adair, the local school districts did not challenge the facial constitutionality of an ordinance; they instead sought a ruling on whether one specific defendant - the state - was complying with the requirements of the Michigan Constitution, and specifically pursued a determination of which programs must be funded by the state. This resembles an "as-applied" challenge far more than a facial challenge. Each school district essentially stood in each other's shoes with respect to enforcing funding requirements against the state.

In addition, the majority opinion glosses over a key portion of Adair's reasoning, which reads as follows:

> "We find that the school districts...also have the same legal interest protected by the Duran I plaintiffs and are similarly in privity. In this case, particularly because only declaratory relief, not damages, was sought, it is evident that all school districts have the same interest."

Adair, 680 NW 2d at 397 (emphasis added). In other words, the local school districts were in privity with each other for res judicata purposes because they all sought the same legal relief; namely, a declaratory judgment regarding mandated funding requirements under the Michigan Constitution. See id. at 396 (holding that interests are identical if "the relief sought by one plaintiff to remedy a challenged action is indistinguishable from that sought by another".)

In the present case, however, Bates and The Garter Belt did not seek the identical legal relief. The Garter Belt invoked the First Amendment as a defense in order to prevent The Township from requiring The Garter Belt to comply with its nudity ordinance. Charter Twp. of Van Buren v. Garter Belt, Inc., 258 Mich App 594, 597; 673 NW 2d 111 (Mich. App. 2003). Bates, in contrast, seeks not only a declaration that The Township's nudity ban is unconstitutional, but also $50,000 in compensatory damages. The majority argues that Bates's damages claim does not render this case distinguishable from Adair because "[t]he only basis [Bates] alleges for such damages is the ordinance's facial unconstitutionality." Maj. Op. at p. 736 (emphasis in original). This proves too much, however, because individual damages always flow from the violation of the legal right at issue.

I believe that the decision in Adair stemmed from the fact that a declaratory judgment was the only relief sought by the various school districts. 680 NW 2d at 397. A party seeking damages, however, has a qualitatively different interest than a party

seeking only declaratory relief. Cf. Phinisee v. Rogers, 229 Mich App 547, 582 NW 2d 852, 855 (1998) (holding that an illegitimate child's interest in establishing paternity is not substantially identical to her mother's interest because "an illegitimate child's interests in establishing paternity, which may extend not only to immediate support payments but also to future social security benefits and inheritance through the biological father, differ from the mother's interests in establishing paternity, which may be focused more on immediate financial concerns"). In addition, the majority's opinion unnecessarily eviscerates the "working functional relationship" portion of Adair's preclusion test, even though Bates and The Garter Belt literally possessed a working relationship.

Because the Michigan Supreme Court recognizes that its ruling in Adair represents the "outer limit of the doctrine" of res judicata, 680 NW 2d at 396, I would decline to apply Adair in a case that is distinguishable on multiple grounds. In my opinion, the more prudent course would be to avoid increasing the already broad scope of Adair, whose holding may raise due process concerns that Bates has not sought to pursue. I therefore respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMANTHA BATES,
Plaintiff,
vs. Case No. 02-73692

TOWNSHIP OF VAN BUREN HON. AVERN COHN
Defendant.
_____/

MEMORANDUM AND ORDER
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND
DENYING PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT [1]

I. Introduction

This is a civil case under 42 U.S.C. § 1983. Plaintiff

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1 The Court originally scheduled this matter for hearing. Upon review of the parties' papers, however, the Court finds that oral argument is not necessary. See E.D. Mich. LR 7.1(e)(2).

2 Bates also claims that Township Ordinances 22-106 through 22-112 were unconstitutional. However, as Van Buren Township notes, these ordinances were superceded and replaced by Township Ordinance 02-16-99(2). The only ordinance at issue therefore is Township Ordinance 02-16-99(2), as Bates conceded in her summary judgment papers.

Samantha Bates (Bates) sued defendant Van Buren Township claiming that Township Ordinance 2-16- 99(2),[2] entitled Nudity on License Premises (the ordinance), violates her First and Fourteenth Amendment rights. Bates an exotic/topless dancer at the Garter Belt. Inc. d/b/a Legg's Lounge (the Garter Belt) located in the township and licensed to sell alcoholic beverages.

In 2003, the parties filed the cross motions fur summary judgment. Although both parties spent a good deal of effort arguing the merits of the case, the constitutionality of the ordinance was being considered by the Michigan Court of Appeals in a parallel proceeding by the Garter Belt, the establishment where Bates works. Accordingly, the Court dismissed the case without prejudice based on the abstention doctrine in Colorado River Water Conservation Dist v. United States, 424 U.S. 800 (1976).

Bates appealed. The Court of Appeals for the Sixth Circuit affirmed the decision to abstain, but modified the Court's decision to require a stay of proceedings rather than a dismissal without prejudice. Bates v. Van Buren Township, No, 03-2258, 2004 WL 2792483 (6th Cir. Dec. 6, 2004) (unpublished) (per curiam). The mandate issued on December 28, 2004. On January 4, 2005, the Court modified its decision and directed that the case be stayed.

Bates then flied a motion to lift the stay and allow supplemental briefing on the summary judgment motions. The Court granted the motion. See Order filed April 15, 2005.he parties filed supplemental briefs. The matter is now ready for decision. For the reasons that follow, Van Buren Township's motion for summary judgment is GRANTED and Bates motion

for partial summary judgment is DENIED. The case is DISMISSED under the doctrine of res judicata.

II. Background[3]

A. The Ordinance

In 1999, Van Buren Township enacted a series of ordinances addressing sexually oriented business, commonly called SOB ordinances.. The ordinance at issue here was one such SOB ordinance known as Ordinance No. 02-16-99(2) (§ 6-69 of Van Buren Township's code of ordinances). It provides, in relevant part as follows:

> Nudity on Licenced Premises.
>
> (1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.
> (2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stocking:
> (a) the whole or part of the pubic region;

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3 This Background is taken from the Courts April 15, 2005 Order.

(b) the whole or part of the anus;
(c) the whole or part of the buttocks;
(d) the whole or part of the genitals;
(e) the breast area including nipple, or more than one-half of the area of the breast.

B. Enforcement Efforts

Dancers at the Garter Belt, including Bates, regularly have exposed their "breast area including nipple, or more than one-half of the area of the breast" while patrons were served alcoholic beverages both before and after the Nudity ordinance was enacted. On August 29, 2000, Van Buren Township sent a letter to the owner of the Garter Belt stating that the Garter Belt was in violation of the ordinance and asked that the violations stop.

C. Court Actions

The Garter Belt apparently did not comply because Van Buren Township filed suit in Wayne County Circuit Court on November 6, 2000, seeking a permanent injunction that would require the Garter Belt to comply with the ordinance. (Garter Belt I). The Garter Belt raised the defense that the ordinance is unconstitutional.

On December 13, 2000, the Garter Belt removed the case to federal court where it was assigned to another judge in this district. Charter Township of Van Buren v. The Garter Belt, No. 00-75395. Two weeks later, on December 28, 2000, the Garter Belt filed a case in federal court against Van Buren Township challenging the scheme of Van Buren Township's SOBs, including the constitutional validity of the ordinance (Garter Belt II). The Garter Belt, Inc. v. Charter Township of Van Buren, No. 00-75630. Garter Belt I and Garter Belt II were consolidated and heard before the same judge.

In Garter Belt I, following an order to show cause, the court remanded the case to Wayne County Circuit Court for lack of subject matter jurisdiction on the grounds that the Garter Belt's federal defenses to the ordinances (that it is unconstitutional) do not provide a basis for federal jurisdiction. See Order Remanding Case to Wayne County Circuit Court For Lack of Subject Matter Jurisdiction and Denying Plaintiffs' Motion to Remand as Moot, filed January 18, 2001, case no. 00-75395.

In Garter Belt II, the court granted Van Buren Township's motion to dismiss on the grounds that the court should abstain from hearing the case in deference to Garter Belt I which gave the Garter Belt an adequate opportunity to present all of its claims, state and federal, regarding the ordinance. See Opinion and Order Granting Defendants' Motion to Dismiss, filed June 28, 2001, case no. 00-765630. The Garter Belt appealed the dismissal. The Court of Appeals for the Sixth Circuit affirmed the district court's decision. Garter Belt, Inc. v. Van Buren Township, No. 01-2093, 2003 WL 21277356 (6th Cir. June 2, 2003) (unpublished).

Following dismissal of Garter Belt II, the Garter Belt and Van Buren Township continued to litigate Garter Belt I in state court. On December 11, 2001, the Wayne County Circuit Court entered a Judgment and permanent injunction against the Garter Belt, stating in part that the ordinance "is without constitutional or legal infirmity" and dismissed the Garter Belt's counterclaims.

The Garter Belt appealed this decision to the Michigan Court of Appeals, raising several claims, including constitutional claims. On September 25, 2003, the Michigan Court of Appeals affirmed the circuit court's decision in a published decision. Charter Township of Van Buren v. Garter Belt, Inc. 258 Mich. App 594 (2003). The Michigan Supreme Court denied leave to appeal. 470 Mich 880 (2004). On November 29, 2004, the United States Supreme Court denied certiorari. 125 S. Ct. 620

(2004).

Following the denial of certiorari, Bates filed a motion to lift the stay and allow supplemental briefing on the summary judgment motions. Bates specifically noted that "new case law" existed which supported her claims. The Court granted the motion. See Order filed April 15, 2005. As to supplemental briefing, the Court stated that "[b]oth parties shall address the issue of the impact of the state court's decision on Bates' claims and whether any doctrine(s) bar(s) her from litigating her claims in this forum." Order at p. 5.

III. Legal Standard

Summary judgment will be granted when the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 587 (1986).

The non-moving party may not rest upon his pleadings; rather, the non-moving party's response "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Showing that there is some metaphysical doubt as to the material facts is not enough; "the mere existence of a scintilla of evidence" in support of the nonmoving party is not sufficient to show a genuine issue of material fact. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 252 (1986). Rather, the nonmoving party must present "significant probative evidence" in support of its opposition to the motion for summary judgment in order to defeat the motion. See Moore v. Philip Morris Co., 8 F. 3d 335, 340 (6th Cir. 1993); see also Anderson, 477 U.S. at 249-50. Additionally, and significantly, "affidavits containing mere conclusions have no probative value" in summary

judgment proceedings. Baharah v. Eltra Corp., 394 F. 2d 502, 503 (6th cir. 1968).

The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." In re Dollar Corp., 25 F. 3d 1320, 1323 (6th Cir. 1994) (quoting Anderson, 477 U.S. at 251-52). The Court "must view the evidence in the light most favorable to the non-moving party." Employers Ins. of Wausau v. Petroleum Specialties, Inc. 69 F. 3d 98, 101 (6th Cir. 1995). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. See Anderson, 477 U.S. at 255. Only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law may summary judgment be granted. Thompson v. Ashe, 250 F. 3d 399, 405 (6th Cir. 2001).

IV. Analysis

As an initial matter, in Bates's supplemental response she says that she is challenging the ordinance on First Amendment grounds; she does not refer to the Fourteenth Amendment. She states: "Bates challenges the Van Buren Township anti-nudity ordinance on the grounds that it restricts her First Amendment right of free speech, Bates is a dancer. It is her expression, communication, and speech that the ordinance was designed to prohibit." Supplemental brief at p. 2.

A. Parties' Arguments - Preclusion/Abstention

Van Buren Township says that Bates is barred from litigating her federal claims in this court by the doctrines of res judicata and Rooker-Feldman. Bates says that these doctrines, as well as any other preclusion/abstention doctrines do not bar her claims. The Court will address only the doctrine it finds applicable.

B. Res Judicata

The parties agree that state law determines whether the first-issued state court decision will have preclusive effect on this forum. See United States v. Dominguez, 359 F. 3d 839, 841 (6th Cir. 2004).

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. Sewell v. Clean Cut Mgt. Inc., 463 Mich 569, 575 (2001). The Michigan Supreme Court "has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." Adair v. State of Michigan, 470 Mich 105, 120 (2004) (citing Dart v. Dart, 460 Mich 573, 586, 597 N.W. 2d 82 (1999)).

Examing the Sewell faactors, the only element Bates contests is the second element - that the parties in the later suit be the same or be those in privity with them. Bates argues that she was not a party to Garter Belt I, that she was not a necessary party to the state court action, she was not notified by Van Buren Township of the state court action, and she is an independent contractor who rents space from the Garter Belt. Bates' argument implicates the scope of the concept of "privity."

The Michigan Supreme Court recently explained the concept of privity in the context of res judicata:

> To be in privity is to be so identified in interest, with another party that the first litigation represents the same legal right that the later litigant is trying to assert. Baraga Co. v. State Tax Comm., 466 Mich 264, 269-270, 645 N.W.

> 2d 13 (2002). The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation. Id., quoting Baraga Co. v. State Tax Comm., 243 Mich App 452, 456, 622 N.W. 2d 109 (2000), citing Phinisee v. Rogers, 229 Mich App 547, 553-554, 582 N.W. 2d 852 (1998)...
>
> Thus, for the purposes of the second Sewell factor, a perfect identity of the parties is not required, only a "substantial identity of interests" that are adequately presented and protected by the first litigant...

Adair, 470 Mich at 122 (emphasis added.)

Here, Bates and the Garter Belt clearly have a "substantial identity of interests:" that the ordinance be struck down on constitutional grounds. Bates works at the very establishment which litigated the case in state court. Bates' interest was presented and protected by the Garter Belt before the Michigan courts. Indeed, the Garter Belt presented a First Amendment challenge to the ordinance. The Garter Belt argued that the ordinance constituted a prior restraint on the First Amendment. The Michigan Court of Appeals disagreed, stating:

> Although being "in a state of nudity" is not an inherently expressive condition," Pap's, supra at 289, 120 S. Ct. 1382 nonobscene nude dancing may be a form of expression falling within the outer limits of the First Amendment. Jott, supra at 526, 569 N.W. 2d 841, citing Barnes, supra at 565-566, 111 S. Ct. 2456. On the other hand, the First Amendment does not protect nude

> dancing involving lewd, sexual activity. Michigan ex rel Wayne County Co. Prosecutor v. Dizzy Duck, 449 mich. 353, 360-361, 365, 535 NW. 2d 178 (1995). So a censor's effort to ban nude dancing because it is obscene may experience difficulties in separating nonobscene expressive conduct from obscene nude dancing. **Defendant's argument fails because neither plaintiff's ordinance nor the injunction at issue here totally bans nude dancing on the basis that it is obscene; the ordinance and the order to comply with the ordinance only prohibit nude dancing at a place where liquor is sold**. Jott, supra at 538, 569 N.W. 2d 841. The "critical fact is that [the ordinance and the injunction enforcing it] has not forbidden [nude dancing] across the board." Id., quoting LaRue, supra at 118, 93 S. Ct. 390.

Garter Belt I, 258 Mich at 624-25 (emphasis added). Thus, the Garter Belt raised the very claim Bates seeks to raise here - that the ordinance violates the First Amendment. Under these circumstances, Bates is in privity with the Garter Belt for purposes of res judicata.

It is noted that the Sixth Circuit, in remanding the case for entry of stay order, indicated that Bates' suit may be able to proceed in federal court following the conclusion of Garter Belt I:

> Because Colorado River abstention is temporary, federal courts will often eventually hear a case they have abstained from deciding. Colorado River abstention is temporary because all the reasons for it dissipate once the state court proceedings have run their course. At that

> point, if any party still has a claim for which it is entitled to a federal forum, and it is not barred by res judicata or a similar doctrine, it may return to federal court. Because, under Colorado River abstention, the parties in the state and federal proceedings need not be identical, the federal suit will normally not be barred by res judicata and federal litigation may resume if the state courts do not moot the issue on state law grounds.

Bates v. Van Buren Township, slip op. at p. 10 (footnotes omitted). The Sixth Circuit's statements are dicta and cannot be construed, as Bates suggests, to mean that she is not barred by res judicata from litigating her claim in this forum. The Sixth Circuit's statements do not take into consideration Michigan law, set forth above, which does not require the same parties for purposes of res judicata. Moreover, the Sixth Circuit's statements are equivocal, not definitive, and even indicate that res judicata may apply.

Although Bates does not challenge the application of the other elements for res judicata, it is worth noting that the elements are satisfied. The Garter Belt I was decided on the merits, and as stated above, the same issue was presented and decided by the Michigan Court of Appeals. In short, Bates is barred by res judicata from litigating her claim in federal court.

SO ORDERED.

Dated: July 25, 2005

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

I hereby certify that a copy of the foregoing document was sent

to counsel of record on this date, July 25, 2005, by electronic and/or ordinary mail.

s/Julie Owens
Case Manager, (313) 234-5160

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SUPREME COURT, U.S.

(3)

No. 06-1220

In the Supreme Court of the United States

SAMANTHA BATES,

Petitioner,

v.

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

TeLisa T. Owens
Counsel of Record
David Szymanski
SOMMERS SCHWARTZ, P.C.
2000 Town Center, Suite 900
Southfield, MI 48075
(248) 355-0300

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

COUNTER-STATEMENT OF QUESTION PRESENTED

1. DID THE SIXTH CIRCUIT COURT PROPERLY AFFIRM, ON RES JUDICATA GROUNDS, THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S FEDERAL CHALLENGING A NUDITY ORDINANCE PROHIBITING BAR OWNERS FROM ALLOWING NUDE DANCING ON THEIR PREMISES WHEN VIRTUALLY IDENTICAL CONSTITUTIONAL CHALLENGES WERE PREVIOUSLY RAISED BY THE BAR WHERE PETITIONER PERFORMED AS AN EXOTIC DANCER AND THE STATE COURTS REJECTED THE BAR OWNER'S CLAIMS, FINDING THE ORDINANCE CONSTITUTIONAL?

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Appendix A: *Van Buren Twp v The Garter Belt, Inc.*, 258 Mich App 594; 673 NW2d 111 (2003) 1b

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STATEMENT OF THE CASE

This Petition involves the constitutionality of a Township ordinance prohibiting nudity in establishments that serve alcohol. Petitioner is an exotic dancer who is challenging the ordinance on grounds that it limits, among other things, her rights of Free Speech. Petitioner's claims were properly dismissed from the federal courts on res judicata grounds because the same constitutional claims were previously raised in Michigan state courts by the business establishment where Petitioner performed as an exotic dancer.

As a threshold matter, Respondent notes that while Petitioner has adequately informed this Court of the procedural timeline of the numerous proceedings in this action, Petitioner provides little detail regarding the exact nature of the claims previously litigated by the business establishment which previously challenged the nudity ordinance. Because the central issue presented in this appeal pertains to the establishment (or negation) of the substantial identity of interests between the litigation involving the business establishment where Petitioner danced and Petitioner's instant claims, it is necessary to provide background information related to the previous litigation. As will be demonstrated below, Petitioner's interests were more than adequately protected in the previous litigation and her claims were exposed as nothing more than forum shopping for a federal venue in an attempt to prolong litigation. Accordingly, the Sixth Circuit properly affirmed the dismissal of her claims on res judicata grounds.

I. Background

A. "*Garter Belt I*" Initiated by the Business Establishment Where Petitioner Performed as an Exotic Dancer

Garter Belt Inc, d/b/a Leggs Lounge, ("Garter Belt," "bar" or "business establishment") owned and operated a bar in Respondent Township that featured nude dancing and was licensed by the Michigan Liquor Control Commission (LCC). In March 1999, Respondent enacted Ordinance No. 02-16-99(2) (§ 6-69 of Respondent's code of ordinances) (Cert. Petition App. H at pp. 31a-32a). The ordinance was worded identically to a neighboring Michigan Township ordinance that the Michigan Court of Appeals, in *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 548; 569 NW2d 841 (1997), held "constitutionally valid and enforceable."

> § 6-69, titled "Nudity on Licensed Premises," provides in relevant part:
>
> (1) No person, while appearing in a state of nudity as defined in this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.
>
> (2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:

(a) the whole or part of the pubic region;
(b) the whole or part of the anus;
(c) the whole or part of the buttocks;
(d) the whole or part of the genitals;
(e) the breast area including nipple, or more than one half of the area of the breast.

(Cert. Petition App. H at p. 31a).

After Garter Belt failed to comply with § 6-69, Respondent in November 2000, sued in Wayne Circuit Court (*Garter Belt I*), seeking to enjoin Garter Belt from featuring nude dancing that violates the ordinance. (Cert. Petition App. I at pp. 33a-38a). Garter Belt answered and, by affirmative defenses and a counterclaim, sought to have the ordinance declared unconstitutional.

B. "*Garter Belt I*" Removed from State Court to Federal Court and Parallel Federal Litigation Begins in "*Garter Belt II*"

In response to the Respondent's Township's filing of its injunctive action in *Garter Belt I*, the Garter Belt, did two things. First, it removed *Garter Belt I* to federal court. (Cert. Petition App. J at pp. 39a-44a). Second, the Garter Belt filed a separate cause of action under 42 U.S.C. 1983 in the U.S. District Court for the Eastern District of Michigan (*Garter Belt II*) challenging the constitutionality of the Nudity on Licensed Premises ordinance. (Cert. Petition App. at K pp. 45a-90a). The removed state case and the Garter Belt's separate federal case were consolidated. Respondent Township then filed a Motion for Abstention which, after extensive briefing, was granted. (Cert. Petition App. O at p. 100a). As a result, the federal court action, *Garter Belt II* was dismissed in June 2001 on abstention grounds without

prejudice (Cert. Petition App. O at p. 100a) and the Wayne County Circuit Court action, *Garter Belt I,* was remanded to state court in January 2001. (Cert. Petition App. M at pp. 94a-96a). Garter Belt appealed the dismissal of *Garter Belt II* to the Sixth Circuit Court of Appeals, which affirmed in June 2003 (Cert. Petition App. N at pp. 97a-106a).

C. *Garter Belt I* Proceedings after Remand

Meanwhile, *Garter Belt I*, following remand, proceeded in Wayne Circuit Court, where Garter Belt reasserted its affirmative defenses and counterclaim to have the ordinance declared unconstitutional. **Garter Belt argued, among other things, that (1) nude dancing is a form of expression protected by the First Amendment, US Const, Am I, (2) that Respondent improperly enacted its ordinance without proof that Garter Belt's operations caused any adverse secondary effects, (3) that subsequent decisions of this Honorable Court superseded *Jott*, (4) that the ordinance was overbroad,[1] and (5) that the ordinance was vague**. The Wayne Circuit Court disagreed and on December 11,

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[1] In arguing that the ordinance was overbroad, Garter Belt contended that the township's prohibition of nudity in establishments that serve alcohol was unconstitutionally overbroad because it bans even plunging necklines and thongs and "legitimate" nude or seminude theatrical performances (*Hair*, *Oh! Calcutta*, *Salome*, and *Dance*). Garter Belt also argued that the ordinance does not distinguish between male or female nudity and argues that the ordinance even extends to exposure of body parts in the restroom of any bar in the township. In addition, Garter Belt asserted that a ban on nudity must be no greater than necessary to address harmful secondary effects and that restrictions beyond "pasties and G-strings" limit the erotic message of dancers, rendering the ordinance overbroad. (App A).

2001, granted of summary disposition to Respondent and issued a permanent injunction enjoining the Garter Belt from violating the ordinance. After an extensive analysis of each of Garter Belt's constitutional claims, the Michigan Court of Appeals affirmed. *Van Buren Twp v The Garter Belt, Inc.*, 258 Mich App 594; 673 NW2d 111 (2003). (App A). The Michigan Supreme Court denied Garter Belt's application for leave to appeal (Cert. Petition App. V at p. 208a) and this Court denied Garter Belt's subsequent petition for writ of certiorari. See United States Supreme Court Docket No. 04-426.

II. Petitioner's Instant Claims

On September 16, 2002, while *Garter Belt I* was pending in state court, Petitioner filed a 42 U.S.C. 1983 action in the United States District Court for the Eastern District of Michigan, seeking damages and challenging the constitutionality of the ordinance pursuant to her First, Fourth, Fifth and Fourteenth Amendment rights. (Cert. Petition App. P at pp. 110a-129a). Following cross-motions for summary judgment, the District Court dismissed Petitioner's case without prejudice on abstention grounds, citing *Colorado River Water Conservation Dist v United States*, 424 U.S. 800 (1976). (Cert. Petition App. G at pp. 19a-30a). The Sixth Circuit affirmed but modified the dismissal order to require a stay of proceedings (Cert. Petition App. F at pp. 8a-18a). Once this Court denied Garter Belt's petition for writ of certiorari in Docket No. 04-426, *supra*, Petitioner filed a motion to lift the stay and allow supplemental briefing. (Cert. Petition App. W at pp. 209a-2118a). The district court lifted the stay and requested that the parties address "the issue of the impact of the state court's decision on Bates' claim and whether any doctrine(s) bar(s) Bates from litigating her claims in this forum" (Cert. Petition

App X at pp. 212a-218a). The district court determined that res judicata barred Petitioner's claim and dismissed the case with prejudice (Cert. Petition App D at p. 6a). The Sixth Circuit, in a split decision, affirmed (Cert. Petition Supp App HH at pp. 243a-269a). Petitioner's motion for rehearing was denied. (Cert. Petition App A at p. 1a)

REASONS FOR DENYING REVIEW

I. THE DISTRICT COURT DID NOT ERR WHEN IT DETERMINED THAT RES JUDICATA BARS THIS ACTION

The critical inquiry in this case is whether Petitioner and the Garter Belt were in sufficient privity to impose the rule of res judicata under Michigan law. The central case in this inquiry is the Michigan Supreme Court's decision in *Adair v State of Michigan*, 470 Mich. 105; 680 N.W.2d 386 (2004). In *Adair*, the Court held that res judicata applies not only when the parties to litigation are identical to the parties in prior litigation, but also where the parties are different but have a "'substantial identity of interests' that are adequately presented and protected by the first litigant." 470 Mich at 122. Petitioner in this case disputes that there was a substantial identity of interests between her and The Garter Belt, and she denies that her interests were adequately presented and protected by The Garter Belt. Respondent maintains that there was a substantial identity and that the Garter Belt adequately pursued the interests of its dancers when it unsuccessfully challenged the ordinance on the same constitutional grounds presented by Petitioner. The district court agreed with respondent, and ruled that res judicata precluded Petitioner's action.

The record demonstrates that that the ordinance at issue here was precisely the same ordinance at issue in the state court action. The same Nudity on Licensed Premises ordinance was the only ordinance at issue when The Garter Belt, Inc. took its appeal from the Wayne County Circuit Court to the Michigan Court of Appeals, which affirmed the Wayne County Circuit Court's entry of a Judgment and Permanent Injunction in favor of the Respondent Township and found the ordinance to be constitutionally compliant in full when it issued its published opinion, in *Garter Belt I.*, 258 Mich App 594 (2003). The Nudity on Licensed Premises Ordinance also formed the sole basis for application for leave to appeal *Garter Belt I.*, to the Michigan Supreme Court on June 24, 2004. Finally, the Nudity on Licensed Premises ordinance also was the only matter at issue when The Garter Belt, Inc. filed its Petition for a Writ of Certiorari to this Honorable Court.

Now before this Court is a situation where a state court decision comes first in time and is followed by a second federal action dealing with precisely the same subject matter. In situations such as this, state law determines whether the first decision will have preclusive effect. See *Boone v Spurgess*, 385 F.3d 923, 934 n.4 (6th Cir. 2004) and *United States v Dominguez*, 359 F.3d 839, 841 (6th Cir. 2004).

Under Michigan law, res judicata precludes a second, subsequent action on the same claim when the prior action was decided on the merits, both actions involve the same parties or their privies and the matter in the second action was or could have been resolved in the first action. See *Adair, supra* at 121. The Court in *Adair* noted that the parties need not be identical, as long as a new party is in privity with an old party:

> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. *Baraga Co. v State Tax Comm.*, 466 Mich. 264, 269-270, 645 N.W.2d 13 (2002). The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation. *Id.*, quoting *Baraga Co. v State Tax Comm.*, 243 Mich App. 452, 456, 622 N.W.2d 109 (2000), citing *Phinisee v Rogers*, 229 Mich App. 547, 553-554, 582 N.W.2d 852 (1998). In litigation concerning the MOS or POUM provisions of the Headlee Amendment, Const. 1963, art. 9, § 29, where a taxpayer or a local unit of government is suing the state, the issue is whether the Legislature's act is unconstitutional as it applies not just to a single local unit of government, but to all local units affected by the legislation. In such cases, the interests of all similar local units of government and taxpayers will almost always be identical. If the relief sought by one plaintiff to remedy a challenged action is indistinguishable from that sought by another, such as when declaratory relief is sought concerning an act of the Legislature establishing the proportion of state funding for local government units, the interests are identical.

So, for the purposes of the second factor stated above, a perfect identity of the parties is not required. All that is required is a "substantial identity of interests" that are adequately presented and protected by the first litigant. On that point, the *Adair* Court went on to state,

> "We find that the interests of the current plaintiffs were, for Headlee purposes, adequately represented by the plaintiffs in *Durant I*. The taxpayer parties all have the same interest: that mandated activities are funded as they are required to be under the Headlee Amendment. These interests were presented and protected by the extensive and thorough litigation that occurred in *Durant I*. Thus, we find the current taxpayer plaintiffs are in privity with the *Durant I* plaintiffs." [470 Mich at 122-123 (footnotes omitted).]

Clearly, the Petitioner here, a topless dancer in the very same bar that also challenged the exact same ordinance through Michigan state courts to the U.S. Supreme Court, has not just "substantially identical interests" but exactly the same interests as have been litigated in full. As the Michigan Court of Appeals decision (App 1b) clearly indicates, the Garter Belt raised the very same claims in state court that Petitioner pursued in federal court.

Thus, contrary to Petitioner's claim that the interests of the Garter Belt are independent, the arguments presented below show that the claims are interconnected. This is true not only because of the economic relationship between them, but also because of the wording of the ordinance. Section 1 of the ordinance states:

> No person, while appearing in a state of nudity as defined in this section, shall frequent, loiter, work for or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.

The ordinance – in a single section – (A) prohibits certain displays of nudity by persons and (B) prohibits certain business establishments from allowing such persons to be present while violating the ordinance. When the Garter Belt sought to overturn the ordinance, it was seeking to employ strippers. The necessary analysis of the ordinance required the courts to determine first whether the strippers were protected in their activities, and then to determine whether the establishment could be prohibited from allowing them to dance nude on the premises. Therefore, the Garter Belt needed judicial authority for its strippers to do their dancing, i.e. the Michigan state courts first had to determine whether the ordinance unconstitutionally restricted those strippers from engaging in protected activity. Similarly, Petitioner needed federal judicial authority to continue her exotic dancing, i.e., the federal courts would also determine whether the ordinance unconstitutionally restricted strippers from engaging in protected activity. In both actions, the courts were asked to view the identical activity (dancing) by the identical persons (strippers working at The Garter Belt) and determine whether the strippers' activities were constitutionally protected under the First Amendment. (See App 1b and Cert. Petition App D at p. 6a).

The identity of interests is also shown by the facts. Petitioner is a dancer at The Garter Belt She was a dancer at that establishment when *Garter Belt I* was litigated. If Garter Belt had succeeded in that case, Petitioner would have directly benefited from the ruling. Conversely, when the Garter Belt failed in its challenges, Petitioner was negatively affected. Petitioner's attorney also represented the Garter Belt in a separate but connected action in the district court. (See Cert. Petition App U at p 206a). Accordingly, Petitioner's claims were properly dismissed under res judicata.

II. THIS COURT SHOULD DECLINE TO REVIEW CLAIMS NOT PREVIOUSLY ADDRESSED BY THE FEDERAL COURTS BELOW.

Petitioner also argues that changes in the law preclude application of res judicata and that the Sixth Circuit improperly refused to apply *Richards v Jefferson County*, 517 US 793 (1996) (holding that "extreme" applications of res judicata deprive parties of Fourteenth Amendment protections). However, these issues were never addressed by the federal courts below and this Court should decline to address issues that were not raised below nor addressed by the court. *Howell v Mississippi*, 543 U.S. 440, 160 L.Ed.2d 873, 125 S.Ct. 856 (2005).

CONCLUSIONS

Petitioner does not present a "compelling" case for review by this Court Moreover, the Petition does not present a substantial question of constitutional law that has not been previously reviewed by this Court nor does it present any conflicts between various jurisdictions. At best, it raises an isolated claim of a federal question which was comprehensively reviewed by the Michigan Court of Appeals. The Court should therefore deny Petitioner's petition because the case does not qualify for or otherwise merit review in this Court. Respondent therefore, respectfully requests that this Court deny the petition and decline to remand the case for further review.

Respectfully submitted,

SOMMERS SCHWARTZ, P.C.
TELISA T. OWENS (P63818)
Counsel of Record
DAVID SZYMANSKI (P40734)
2000 Town Center, Suite 900
Southfield, MI 48075
248-355-0300

Attorneys for Respondent

Dated: April 6, 2007

APPENDIX

APPENDIX A

673 N.W.2d 111, 258 Mich.App. 594, 673 N.W.2d 111

Court of Appeals of Michigan.
Charter TOWNSHIP of VAN BUREN,
Plaintiff-Appellee,

v.

GARTER BELT INC., d/b/a Legg's Lounge,
Defendant-Appellant.

Docket No. 238571.

Submitted Sept. 16, 2003, at Detroit.
Decided Sept. 25, 2003, at 9:00 a.m.
Released for Publication Nov. 26, 2003.

Background: Township sought permanent injunction against liquor establishment, enforcing the township's ordinance prohibiting nudity at establishments licensed to sell alcohol. The Circuit Court, Wayne County, John D. O'Hair, J., granted the injunction and entered summary disposition for township. Establishment appealed.

Holdings: The Court of Appeals, Markey, P.J., held that:

(1) there was no basis for disqualification of trial judge;

(2) State did not preempt local regulation of nudity;

(3) ordinance was a content-neutral time, place, and manner regulation designed to serve a substantial governmental interest in preserving the quality of urban life while allowing for reasonable alternative avenues of communication;

(4) permanent injunction enforcing township's ordinance was not a "prior restraint" of expression protected by the First Amendment;

(5) ordinance was not unconstitutionally overbroad; and

(6) ordinance was not unconstitutionally vague.

Affirmed.

*595 Sommers, Schwartz, Silver & Schwartz, P.C. (by Patrick B. McCauley, David J. Szymanski, and Patrick Burkett), Southfield, for the plaintiff.

Rubin & Rubin, P.L.L.C. (by Allan S. Rubin), and Shafer & Associates, P.C. (by Bradley J. Shafer), Southfield, Lansing, for the defendant.

Before: MARKEY, P.J., and MARK J. CAVANAGH and SAAD, JJ. MARKEY, P.J.

Defendant Garter Belt, Inc., appeals by right the trial court's order granting plaintiff, Charter Township of Van Buren, summary disposition and a permanent injunction enforcing the township's ordinance prohibiting nudity at establishments licensed to sell alcohol. Defendant also appeals the denial of its motion to vacate the judgment and disqualify the trial judge. We first find that no abuse of discretion occurred with regard to the denial of defendant's motion for judicial disqualification and conclude that due

process does not require disqualification under *596 the totality of the circumstances presented in this matter. We also hold that state law does not preempt the township's ordinance because we conclude that the Legislature did not intend its regulation of nudity at establishments licensed to sell alcohol to change the longstanding broad authority of local governments to regulate liquor trafficking within their jurisdiction. We consider last defendant's constitutional **117 claims.[1] We hold that both Van Buren Township's ordinance and the permanent injunction are constitutionally valid.

I. Summary of Material Facts and Proceedings

Defendant owns and operates a bar in Van Buren Township that features nude dancing and is licensed by the Michigan Liquor Control Commission (LCC). In March 1999, Van Buren Township enacted Ordinance No. 02-16-99(2) (§ 6-69 of plaintiff's code of ordinances), which prohibits persons "appearing in a state of nudity" from frequenting, loitering, working, or performing in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. It is not disputed that defendant featured nude dancing long before the adoption of § 6-69 and that Van Buren Township's ordinance is worded identically to that part of a Clinton Township ordinance that this Court held "constitutionally valid and *597 enforceable" in *Jott, Inc. v.*

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[1] We first review nonconstitutional issues "that might obviate the necessity of deciding the constitutional" issues. *Taxpayers of Michigan Against Casinos v. Michigan*, 254 Mich.App. 23, 43, 657 N.W.2d 503 (2002). See also *People v. Riley*, 465 Mich. 442, 447, 636 N.W.2d 514 (2001) ("constitutional issues should not be addressed where the case may be decided on nonconstitutional grounds").

Clinton Charter Twp., 224 Mich.App. 513, 548, 569 N.W.2d 841 (1997).

After defendant failed to comply with § 6-69, plaintiff sued, seeking to enjoin defendant from featuring nude dancing that violates the ordinance. Defendant answered and, by affirmative defenses and a counterclaim, sought to have the ordinance declared unconstitutional. Plaintiff moved for summary disposition, arguing that the ordinance was not a complete ban on nude entertainment, but, instead, was a valid liquor control ordinance designed to combat known adverse secondary adverse effects associated with the combination of nudity and the consumption of alcohol. Defendant argued that nude dancing is a form of expression protected by the First Amendment, U.S. Const., Am. I, and that plaintiff improperly enacted its ordinance without proof that defendant's bar caused any adverse secondary effects. Specifically, defendant argued that subsequent decisions of the United States Supreme Court superseded *Jott*.

The trial court disagreed that a legislative body must hold an evidentiary hearing to determine whether a proposed ordinance would further a legitimate governmental interest. Instead, the trial court concluded that a legislative body could consider any material it deems pertinent and may also employ common sense. The court concluded that under the Twenty-first Amendment, U.S. Const., Am. XXI, the state and local units of government have authority to control liquor traffic within their jurisdiction even though such regulation may incidentally affect activity protected by the First Amendment. Finding that the case at bar was controlled by *Jott*, the trial court granted *598 summary disposition to plaintiff and permanently enjoined defendant from violating the ordinance.

On December 28, 2001, this Court denied defendant's motion for a stay of the judgment and the injunction. We denied reconsideration on January 9, 2002. On January 23, 2002, our Supreme Court denied defendant's application for leave to appeal. This Court denied defendant's motion for peremptory reversal on April 18, 2002.

II. Judicial Disqualification

We review for an abuse of discretion the trial court's factual findings on a **118 motion for disqualification, but the application of the facts to the law is reviewed de novo. *Cain v. Dep't of Corrections,* 451 Mich. 470, 503 n. 38, 548 N.W.2d 210 (1996); *Armstrong v. Ypsilanti Charter Twp.,* 248 Mich.App. 573, 596, 640 N.W.2d 321 (2001).

A judge is disqualified when he cannot hear a case impartially. *Cain, supra* at 503, 548 N.W.2d 210. But a party challenging the impartiality of a judge "must overcome a heavy presumption of judicial impartiality." *Id.* at 497, 548 N.W.2d 210. In general, the challenger must prove a judge harbors actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial. MCR 2.003(B)(1); *Cain, supra* at 495, 548 N.W.2d 210; *Armstrong, supra* at 597, 640 N.W.2d 321. Here, the public comments Judge John D. O'Hair purportedly made in 1996 when he was the Wayne County Prosecuting Attorney do not establish the requisite actual bias or prejudice to overcome the presumption of judicial impartiality.

At the hearing on defendant's motion, Judge O'Hair denied having any personal bias or prejudice. He also *599 denied knowing that defendant's owner, who had contributed funds to a "Dump O'Hair" election year effort in 1996, was even involved in this case. Indeed, O'Hair asserted that he

did not take such matters personally and had "long forgotten" events defendant raised until the motion to disqualify was filed after the court had already ruled. Further, O'Hair affirmed that his decision was controlled by the law, and not by any discretionary fact-finding on his part. On review de novo, Chief Judge Michael F. Sapala found that O'Hair had been "a long-time sitting Judge of the Wayne County Circuit Court, blessed with an impeccable reputation with regard to integrity." Chief Judge Sapala also found that comments on public issues attributed to O'Hair while he was the prosecutor five years earlier were insufficient to demonstrate actual bias in light of O'Hair's impeccable reputation. The chief judge's factual findings are reviewed with deference, and the record here does not establish that an abuse occurred in finding that O'Hair was not actually biased or prejudiced. *Cain, supra* at 503, 548 N.W.2d 210.

We also find no merit in defendant's argument that the appearance of bias is too high to be constitutionally tolerated. Due process requires judicial disqualification without a showing of actual prejudice only in the most extreme cases. *Cain, supra* at 497-498, 548 N.W.2d 210. A showing of actual bias is not necessary to disqualify a judge where "'experience teaches that the probability of actual bias ... is too high to be constitutionally tolerable.'" *Crampton v. Dep't of State,* 395 Mich. 347, 351, 235 N.W.2d 352 (1975), quoting *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). Our Supreme Court noted such situations include: (1) where the judge has a pecuniary interest in the outcome;*600 (2) where the judge has been the subject of personal abuse or criticism from the party before him; (3) where the judge is enmeshed in other matters involving the complaining party; or (4) where the judge might have prejudged the case because of having previously acted as an accuser, fact-finder, or initial decision maker.

Crampton, supra at 351, 235 N.W.2d 352. Although not exclusive, the *Crampton* categories should be narrowly interpreted in light of examples provided by the Supreme Court and are "not to be viewed as catch-all provisions for petitioners desiring disqualification." *Cain, supra* at 500 n. 36, 548 N.W.2d 210.

**119 Defendant does not claim that Judge O'Hair held a pecuniary interest in the instant case, but does claim that the other *Crampton* categories apply. But defendant produced only newspaper reports from 1996 showing that defendant's principal owner, who is not a party to the instant case, had been critical of Judge O'Hair's criminal law enforcement activity when the judge was the prosecutor five years earlier. Defendant's owner had also contributed to an anti-O'Hair political fund. According to press reports, O'Hair responded to the attack by stating that he would not be intimidated from enforcing the law. "'The mere fact that a judge has been subjected to press criticism in connection with a case or a party does not necessarily require the judge's disqualification.'" *Cain, supra*PERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=595&FindType=Y&SerialNum=1996119645" at 515, 548 N.W.2d 210, quoting *Illinois v. Coleman,* 168 Ill.2d 509, 541, 214 Ill.Dec. 212, 660 N.E.2d 919 (1995). Here, there was no evidence to contradict Judge O'Hair's claim that he did not know who owned defendant until after rendering his ruling and had not taken long-forgotten criticism personally. Narrowly construed, the *Crampton* "personal abuse" category does not apply.

*601 Similarly, *Crampton* categories three and four, narrowly construed, did not require recusal of Judge O'Hair on the basis of his activity as a prosecutor five years before in enforcing the criminal law and his public comments related to

that activity. Defendant's claims do not demonstrate that Judge O'Hair was "enmeshed" with a party in other matters, or that he had prejudged civil enforcement of a township ordinance regulating establishments that serve alcohol. Generally, a prosecutor is not disqualified from future activity as a judge, unless he had directly participated in the same case, MCR 2.003(B)(3), or directly participated in the prosecution of the defendant within the prior two years, MCR 2.003(B)(4). See *People v. Williams (After Remand),* 198 Mich.App. 537, 544, 499 N.W.2d 404 (1993), and *People v. Delongchamps,* 103 Mich.App. 151, 156, 302 N.W.2d 626 (1981). Also, topics that were once hot topics will cool with the passage of time. *Cain, supra* at 515, 548 N.W.2d 210. And, "'Prior written attacks upon a judge are ... legally insufficient to support a charge of bias or prejudice on the part of a judge toward an author.'" *Id.* at 516 n. 52, 548 N.W.2d 210, quoting *United States v. Bray,* 546 F.2d 851, 858 (C.A.10, 1976). Finally, "[t]he mere fact that a judge has previously expressed himself on a particular point of law is not sufficient to show personal bias or prejudice." *Id.* at 857.

The totality of the circumstances must be examined to determine if the present case is so extreme that due process requires disqualification without proof of actual bias. *Armstrong, supra* at 598, 640 N.W.2d 321. We conclude that the totality of the circumstances, including the *602 suspect timing [2] of the motion after Judge O'Hair had ruled in

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[2] Although defense counsel claimed to be surprised that Judge O'Hair heard plaintiff's motion for summary disposition on November 30, 2001, the trial court record reflects a September 6, 2001, scheduling order signed by Judge O'Hair, acting for and in the absence of Judge Jeanne Stempien. The trial court record also contains a proof of service by mailing the scheduling order to both

plaintiff's favor, *Wayne Co. Jail Inmates v. Wayne Co. Chief Executive Officer,* 178 Mich.App. 634, 665, 444 N.W.2d 549 (1989), does not establish that the probability of actual bias is so high as to require disqualification without a showing of actual bias or prejudice. *Armstrong, supra* at 599, 640 N.W.2d 321. Because Chief Judge Sapala **120 did not abuse his discretion in finding that the presumption of judicial impartiality had not been overcome with a showing that Judge O'Hair was actually biased or prejudiced, error warranting reversal did not occur.

III. State Law Preemption

We review de novo a trial court's ruling on a motion for summary disposition and its resolution of constitutional issues raised. *Id.* at 582, 640 N.W.2d 321. Whether state law preempts plaintiff's ordinance is a question of law involving statutory construction that we also review de novo. *Saginaw Co. v. John Sexton Corp. of Michigan,* 232 Mich.App. 202, 214, 591 N.W.2d 52 (1998).

Defendant, relying on *Nadeau v. Clinton Charter Twp.,* 827 F.Supp. 435 (E.D.Mich., 1992), argues that MCL 41.181, through its definition of "nudity," limits a township to imposing "pasties and G-strings" regulations. Defendant also argues that MCL 436.1916(3) divests counties with a population of ninety-five thousand*603 or more from enacting topless activity regulations broader than those found in state law. We disagree. State law does not preempt local regulation of nudity at establishments licensed to sell alcohol because MCL 436.1916(3) expressly states, in part: "This section is not intended to prevent a local unit of government

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of defendant's cocounsel on September 17, 2001.

from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government." This Court is also bound by *Jott, supra* at 543-545, 569 N.W.2d 841, which held that a local ordinance identical to plaintiff's neither conflicted with nor was preempted by MCL 41.181. MCR 7.215(J)(1); *Dunn v. Detroit Auto. Inter-Ins Exchange,* 254 Mich.App. 256, 260-261, 657 N.W.2d 153 (2002).

The *Jott* Court held that state law did not preempt Clinton Township from adopting an ordinance nearly identical to the one at issue in this case. *Jott, supra* at 543-545, 569 N.W.2d 841. Although MCL 41.181 conferred general authority on townships to regulate public nudity, the ordinance at issue regulated liquor traffic rather than nudity per se. *Jott, supra* at 544, 569 N.W.2d 841. And the Court found evidence that the Legislature did not intend to preempt local regulation because it had "conferred control over alcoholic beverage traffic in this state on the LCC, which ... has adopted Rule 436.1409(1),[3] explicitly recognizing the authority of local governmental units to prohibit different types of nudity in establishments*604 holding liquor licenses." *Jott, supra* at 544-545, 569 N.W.2d 841. Further, "it has long been recognized that local communities possess 'extremely broad' powers to regulate alcoholic beverage traffic within their bounds through the exercise of their

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[3] 1980 AACS, R 436.1409(1), effective February 3, 1981, provides: "An on-premises licensee shall not allow in or upon the licensed premises a person who exposes to public view the pubic region, anus, or genitals or who displays other types of nudity prohibited by statute or local ordinance." The rule has not been amended or repealed since the adoption of 1998 PA 58, the Michigan Liquor Control Code, MCL 436.1101 *et seq.*, effective April 14, 1998.

general police powers, subject to the authority of the LCC when a conflict arises." *Id.* at 545, 569 N.W.2d 841, citing *Bundo v. Walled Lake,* 395 Mich. 679, 700, 238 N.W.2d 154 (1976), and *Tally v. Detroit,* 54 Mich.App. 328, 334, 220 N.W.2d 778 (1974). So, this Court held that the definition of nudity in MCL 41.181 neither conflicted with nor preempted Clinton Township's ordinance. *Jott, supra* at 545, 569 N.W.2d 841.

**121 With respect to defendant's argument that MCL 41.181 preempts plaintiff's ordinance, *Jott* is binding precedent on this Court. MCR 7.215(J)(1); *Dunn, supra* at 260-261, 657 N.W.2d 153. Defendant's reliance on *Nadeau, supra,* is misplaced because that case addressed the same Clinton Township ordinance at issue in *Jott.* This Court is not bound by federal decisions interpreting Michigan law. *Ryder Truck Rental, Inc. v. Auto-Owners Ins. Co., Inc.,* 235 Mich.App. 411, 416, 597 N.W.2d 560 (1999). Moreover, *Nadeau* was vacated by stipulation of the parties. See *Jott, supra* at 522, 569 N.W.2d 841.

But defendant also argues that the Legislature codified state liquor laws after *Jott* was decided by adopting 1998 PA 58, effective April 14, 1998. Defendant points to § 916 of the Michigan Liquor Control Code (MLCC), MCL 436.1101 *et seq.,* which requires liquor licensees to obtain entertainment, dance, and topless activity permits. MCL 436.1916. Defendant specifically relies on subsection 916(3) of the MLCC, which provides:

> An on-premises licensee shall not allow topless activity on the licensed premises unless the licensee has applied for *605 and been granted a topless activity permit by the commission. This section is not intended to prevent a local unit of government

> from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government. This subsection applies only to topless activity permits issued by the commission to on-premises licensees located in counties with a population of 95,000 or less. [MCL 436.1916(3).]

Defendant argues that because Van Buren Township is situated in Wayne County with a population number greater than ninety-five thousand the third sentence of subsection 916(3) removes the specific legislative grant of authority to local governments found in the second sentence. In essence, defendant argues that the state has preempted local regulation of nudity in licensed establishments in counties with a population count greater than ninety-five thousand pursuant to the first of four guidelines set forth in *People v. Llewellyn,* 401 Mich. 314, 322, 257 N.W.2d 902 (1977), for determining when the state has preempted local regulation "by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." The *Llewellyn* guidelines provide a state regulatory scheme preempts local regulation: (1) when state law expressly provides that the state's authority is exclusive; (2) when preemption is implied in legislative history; (3) although generally not sufficient by itself, when the pervasiveness of the state regulatory scheme supports such a finding; and, (4) when the nature of the regulated subject matter demands exclusive state control to achieve the uniformity necessary to serve the purpose or interest of the state. See *606*Rental Prop Owners Ass'n of Kent Co. v. Grand Rapids,* 455 Mich. 246, 257, 566 N.W.2d 514 (1997), and *Llewellyn, supra* at 323-324, 257 N.W.2d 902. Defendant argues that the state has expressed its intention in subsection 916(3) to exclusively

occupy the field of regulating nudity in licensed establishments located in large counties. *See e.g., Michigan Coalition for Responsible Gun Owners v. Ferndale,* 256 Mich.App. 401, 413-414, 662 N.W.2d 864 (2003) (holding that when the Legislature has expressly stated its intent to exclusively occupy a field it is unnecessary to consider the other three *Llewellyn* factors).

Applying well-settled principles of statutory construction, defendant's argument fails. This Court's primary obligation**122 when interpreting a statute is to ascertain and give effect to the intent of the Legislature. *Gladych v. New Family Homes, Inc.,* 468 Mich. 594, 597, 664 N.W.2d 705 (2003). We must presume the Legislature intended the meaning clearly expressed and must enforce a statute as written. *Id.; People v. Morey,* 461 Mich. 325, 330, 603 N.W.2d 250 (1999). Thus, speculation about an unstated legislative purpose must not replace the unambiguous, plain text of a statute. *Gladych, supra.* Where an ambiguity requires interpretation, the statutory language should be construed reasonably, keeping in mind the purpose of the act. *Draprop Corp. v. Ann Arbor,* 247 Mich.App. 410, 415, 636 N.W.2d 787 (2001).

We cannot accept defendant's speculative claim that the third sentence of MCL 436.1916(3) defeats the explicit, expressed intent in the second sentence. *Gladych, supra.* Defendant's construction also contravenes the settled principle that every word, phrase, and clause of a statute be given effect. *Morey, supra* at 330, 603 N.W.2d 250. More important, the Legislature is presumed *607 to be aware of longstanding judicial, see *Jott, supra* at 545, 569 N.W.2d 841, and administrative interpretations, see 1980 AACS, R

436.1409(1),[4] upholding local control of nudity in connection with liquor trafficking. *Gordon Sel-Way, Inc. v. Spence Bros., Inc.*, 438 Mich. 488, 505, 475 N.W.2d 704 (1991); *Consumers Power Co. v. Dep't of Treasury*, 235 Mich.App. 380, 388, 597 N.W.2d 274 (1999). Although aware of the longstanding administrative and judicial deference to local control, the Legislature did not positively revoke the LCC's longstanding rule, nor disapprove this Court's holding in *Jott*. Rather, the Legislature expressly provided that the adoption of § 916 was "not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government." MCL 436.1916(3). Parts of a statute must be read in the context of the entire statute so as to produce a harmonious whole, *Macomb Co. Prosecutor v. Murphy*, 464 Mich. 149, 159, 627 N.W.2d 247 (2001). Here, the Legislature granted local units of government the ability to veto any state permit, MCL 436.1916(3). In sum, defendant's interpretation of MCL 436.1916(3) is unreasonable in light of the express language the Legislature used and the longstanding judicial and administrative interpretation approving extremely broad authority of local governments to regulate liquor trafficking. *Jott, supra* at 545, 569 N.W.2d 841.

Although legislative analysis is of limited value in interpreting a statute, *608*Frank W Lynch & Co. v. Flex Technologies, Inc.*, 463 Mich. 578, 587, 624 N.W.2d 180 (2001), a reasonable interpretation of the statute consistent with its express language is set forth in House Legislative Analysis, Third Analysis, HB 4454, July 9, 1998. After commenting on the apparent problem addressed by

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[4] See n. 3.

recodification of liquor control laws, the analysis reads: "In addition, some have proposed adding language to the liquor code to allow local governments more authority to regulate topless entertainment." *Id.*, p. 1. After summarizing the proposed recodification, the analysis provides, in part:

> In addition to the reorganization of sections, the bill would make the following *substantive changes:*
>
> > The bill would create a topless activity permit for on-premise licensees, in addition to the dance and entertainment permits currently issued under departmental rules.... Topless activity would be **123 banned without a topless activity permit in those counties with a population of 95,000 or less. However, a local unit of government would not be prevented from enacting an ordinance to prohibit topless activity or nudity on licensed premises within its jurisdiction. [*Id.*, p. 4.]

We therefore conclude that the Legislature intended through the express language of MCL 436.1916(3) to continue the longstanding broad authority of a local government to regulate liquor traffic within its jurisdiction. Accordingly, we hold that state law does not preempt local regulation of nudity at establishments licensed to sell alcohol.

IV. Constitutional Issues

A. Standard of Review

We review de novo both a trial court's ruling on a motion for summary disposition and its resolution of *609 any constitutional issues raised. *Armstrong, supra* at 582, 640 N.W.2d 321. Statutes and ordinances are presumed to be

constitutional and the burden of proving otherwise rests with the challenger. *Gora v. Ferndale,* 456 Mich. 704, 711-712, 576 N.W.2d 141 (1998); *People v. Boomer,* 250 Mich.App. 534, 538, 655 N.W.2d 255 (2002). Further, we must construe a statute or ordinance as constitutional unless its unconstitutionality is clearly apparent. *Owosso v. Pouillon,* 254 Mich.App. 210, 213, 657 N.W.2d 538 (2002); *People v. Barton,* 253 Mich.App. 601, 603, 659 N.W.2d 654 (2002).

B. Rational Basis Scrutiny of Liquor Regulations

Defendant argues that the trial court erred by applying rational basis scrutiny to liquor control laws as employed by the *Jott* Court in reliance on *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), and its progeny. *LaRue* held that the Twenty-first Amendment conferred broad powers on the states to regulate sexually explicit entertainment in establishments licensed to sell alcoholic beverages. In particular, defendant argues that *Jott* has been superseded by subsequent decisions of the United States Supreme Court, including *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), and *City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), which applied intermediate scrutiny established in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), for expressive conduct protected by the First Amendment. We disagree. *Jott, supra,* binds this Court. MCR 7.215(J)(1). The United States Supreme Court has not clearly repudiated, either in *44 Liquormart, supra,* or *Pap's, supra,* the underlying *610 premise of *LaRue* and its progeny that a state may, in the exercise of its inherent police powers, constitutionally regulate appropriate places where liquor may be sold, including prohibiting nudity at licensed to sell alcohol establishments.

The Supreme Court in *LaRue, supra,* upheld the constitutionality of California's ban on nudity, and real or simulated sexual acts, in establishments licensed to serve alcohol. The *LaRue* Court observed that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." *LaRue, supra* at 114, 93 S.Ct. 390. The Twenty-first Amendment provides, in part: "The transportation or importation into any State ... for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const., Am. XXI. Although not holding that the Twenty-first Amendment superseded other parts of the United States Constitution, the *LaRue* **124 Court nevertheless concluded that "the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened...." *LaRue, supra* at 115, 93 S.Ct. 390. The Court also concluded that California's determination that the "sale of liquor by the drink and lewd or naked dancing and entertainment" should not occur in the same place was rational. *Id.* at 115, 93 S.Ct. 390. And the Court reasoned that although some of the banned performances "are within the limits of the constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board," but rather "has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *611*Id.* at 118, 93 S.Ct. 390. Thus, the *LaRue* Court held that California's ban on "bacchanalian revelries" at establishments licensed to sell alcoholic beverages did not violate the United States Constitution "[g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires...." *Id.* at 118-119, 93 S.Ct. 390.

The Supreme Court affirmed its holding in *LaRue* in at least three subsequent decisions: *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), and *Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986). In *Doran*, the Court upheld a preliminary injunction against enforcement of a local ordinance that banned topless dancing not only in bars but also in any public place. The Court summarized *LaRue* and held "that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program." *Doran, supra* at 932-933, 95 S.Ct. 2561. But because the ordinance was not limited to bars and no other legitimate state interest was suggested to counterbalance the constitutional protection presumptively afforded to activities within the scope of the ordinance, the preliminary injunction was held to have been properly issued. *Id.* at 933-934, 95 S.Ct. 2561.

In *Bellanca, supra*, the Supreme Court considered a challenge based on the First Amendment to a New York law banning nude dancing at establishments licensed to sell liquor for consumption on the premises. The Court reviewed its decisions in *LaRue* and *612 *Doran*, and concluded that the state of New York had done just what the Court had said a state could do. *Bellanca, supra* at 717, 101 S.Ct. 2599. The Court reasoned that because New York possessed the power to ban the sale of alcoholic beverages entirely it could also ban the sale of liquor on premises where topless dancing occurs. *Id.* While not requiring legislative findings to support the ban, the Court found them in a legislative memorandum that included the observation that "'[c]ommon sense indicates that any form of nudity coupled with alcohol

in a public place begets undesirable behavior.'" *Id.* at 718, 101 S.Ct. 2599. So, the Court held that New York had "chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption." *Id.* The Court concluded that New York's policy choice did not violate the United States Constitution given the "'added presumption in favor of the validity of the state regulation' conferred by the Twenty-first Amendment...." *Id.*, quoting *LaRue, supra*PERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1972127220" at 118, 93 S.Ct. 390.

In *Iacobucci,* the city of Newport, Kentucky, enacted an ordinance that prohibited**125 nude or nearly nude dancing in local establishments licensed to sell liquor for consumption on the premises. A challenge to the ordinance under the First and Fourteenth Amendments failed in the federal district court. *Id.* at 92-93, 107 S.Ct. 383. The Sixth Circuit Court of Appeals reversed the holding of the district court, 785 F.2d 1354 (C.A.6, 1986), finding that *Bellanca* did not apply because in Kentucky local voters, not the city or the commonwealth, determine whether alcohol may be sold locally. *Iacobucci, supra* at 94, 107 S.Ct. 383. The Supreme Court disagreed, finding that *Bellanca* controlled because *613 the commonwealth's authority under the Twenty-first Amendment extended to the city. *Id.* at 94, 107 S.Ct. 383. The Court opined:

> In holding that a State "has broad power ... to regulate the times, places, and circumstances under which liquor may be sold," *Bellanca,* 452 U.S., at 715, 101 S.Ct. 2599 this Court has never attached any constitutional significance to a State's division of its

> authority over alcohol. The Twenty-first Amendment has given broad power to the States and generally they may delegate this power as they see fit. [*Iacobucci, supra* at 96, 107 S.Ct. 383.]

This Court, relying on *LaRue* and *Bellanca,* applied rational basis scrutiny to a First Amendment challenge to a Clinton Township ordinance identical in pertinent parts to plaintiff's ordinance. *Jott, supra* at 538, 569 N.W.2d 841. The *Jott* Court found that the parts of the Clinton Township ordinance identical to the Van Buren Township ordinance at issue here were rationally related to the legitimate governmental interest of eradicating the effects of "'"undesirable behavior"'" stemming from a combination of alcohol and nudity. *Id.* at 546, 569 N.W.2d 841, quoting *Bellanca, supra* at 718, 101 S.Ct. 2599 quoting the legislative memorandum relied on in *Bellanca.* After severing invalid parts of the ordinance, this Court held "the remainder of the ordinance constitutionally valid and enforceable." *Jott, supra* at 548, 569 N.W.2d 841.

In *44 Liquormart, supra* at 489, 116 S.Ct. 1495 the Supreme Court held that Rhode Island's statutory prohibition against advertisements containing accurate information about retail prices of alcoholic beverages was invalid because it abridged speech protected by the First Amendment. The *44 Liquormart* Court held that the Twenty-first Amendment did not shield the ban on *614 commercial speech from constitutional scrutiny.[5] *Id.* at 488, 516, 116 S.Ct. 1495. The

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[5] A decade before the Supreme Court decided *44 Liquormart,* this Court held that a ban on advertising liquor prices was an unconstitutional restraint on commercial speech not shielded by the Twenty-first Amendment. *Michigan Beer & Wine Wholesalers*

Court also limited its decision in *LaRue*. "Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twentyfirst Amendment." *Id.* at 516, 116 S.Ct. 1495. The Court reasoned that because the Twenty-first Amendment did not diminish other provisions of the United States Constitution, including the Supremacy Clause, the Establishment Clause, or the Equal Protection Clause, it would not diminish the First Amendment. *Id.* Nevertheless, the Court opined that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *Id.* at 515, 116 S.Ct. 1495. Moreover, a state's inherent police powers "provide ample authority to restrict the kind of 'bacchanalian revelries' described **126 in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *Id.*

In *Jott*, this Court specifically rejected defendant's argument that *44 Liquormart* requires a higher level of scrutiny than rational basis when reviewing a state's exercise of its police powers under the Twenty-first Amendment to regulate appropriate places to sell alcohol. The *Jott* Court opined:

> We reject plaintiff's claim, asserted at oral argument, that the holding in *LaRue* was recently overruled by the Supreme Court in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). Unlike this case, *44 Liquormart* was a "commercial speech" case. It *615 involved a challenge to a state law banning advertisement of

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Ass'n v. Attorney General, 142 Mich.App. 294, 370 N.W.2d 328 (1985).

> retail liquor prices. The Supreme Court expressly noted that laws suppressing speech are subject to greater constitutional scrutiny than laws suppressing forms of conduct. Although the Supreme Court did retreat somewhat from its position in *LaRue*, it did so only insofar as *LaRue* advanced the proposition that the constitutional prohibition against laws abridging freedom of speech embodied in the First Amendment may be shielded from attack by virtue of the Twenty-first Amendment. Indeed, the court expressly stated that it was not questioning its holding in *LaRue*. The Court noted that *LaRue*, unlike the case before it, was not a commercial speech case, but instead concerned the regulation of nude dancing where alcohol was served. The Court expressly stated that its analysis in *LaRue* would have yielded the same result, independent of the Twenty-first Amendment, in light of the state's ample inherent powers to prohibit the sale of alcoholic beverages in inappropriate locations and to restrict the kind of sexual activities described in *LaRue*. For these reasons, we find that *44 Liquormart* does not affect the disposition of this case. [*Jott, supra* at 539 n. 6, 569 N.W.2d 841.]

Jott is binding on this Court. MCR 7.215(J)(1); *Dunn, supra* at 260-261, 657 N.W.2d 153.

We also reject defendant's claim that the Supreme Court's decision in *Pap's A.M., supra,* requires a different result because *Pap's* did not address the issue of where alcohol may be sold but, rather, concerned a general community-wide ban on nudity similar to that considered in *Doran, supra.* Thus, *Pap's* does not call into question the state's exercise of its police power to "prohibit the sale of alcoholic beverages in

inappropriate locations." *44 Liquormart, supra* at 515, 116 S.Ct. 1495; *Jott, supra*LINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=595&FindType=Y&SerialNum=1997151740" at 539 n. 6, 569 N.W.2d 841.

Defendant's argument is also not supported by *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). That case addressed *616 whether the city of Los Angeles could rely on a 1977 study of crime to justify its zoning restrictions on adult entertainment businesses (prohibiting them within one thousand feet of each other or within five hundred feet of a religious institution, school, or public park). *Id.* at 430-433, 441, 122 S.Ct. 1728. The Supreme Court in *Alameda Books* intended to clarify the standard of review for content-neutral time, place, and manner regulations designed to combat adverse secondary effects of businesses that purvey sexually explicit materials. *Id.* at 433-434, 122 S.Ct. 1728; *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Content-neutral time, place, and manner regulations are constitutionally valid if they are "designed to serve a substantial governmental interest and [allow] for reasonable alternative avenues**127 of communication." *Id.* at 50, 106 S.Ct. 925; *Jott, supra* at 529, 569 N.W.2d 841.

The plurality opinion in *Alameda Books* concluded that Los Angeles could rely on its 1977 study because it supported the city's theory that a concentration of adult operations in one locale attracts crime. *Alameda Books, supra* at 442, 122 S.Ct. 1728. The Court reasoned that a governmental unit is entitled to rely on "any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *Id.* at 438, 122 S.Ct. 1728 citing *Renton, supra* at 51-52, 106 S.Ct. 925 and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584,

111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in judgment). The government meets its burden if the evidence relied on fairly supports its rationale. *Alameda Books, supra* at 438, 122 S.Ct. 1728. If a challenger fails to cast direct doubt on the government's rationale, either by demonstrating that the evidence does not support the rationale of the *617 government or by furnishing evidence that disputes the government's factual findings, the municipality meets the *Renton* standard. *Id.* at 438-439, 122 S.Ct. 1728. If the challenger is successful in raising doubt about the government's rationale, "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439, 122 S.Ct. 1728. Importantly, the plurality opinion did not address whether the government must actually consider the evidence supporting its rationale before adopting the regulation. *Id.* at 442, 122 S.Ct. 1728. Rather, the Court left intact its prior holding that the government may support its rationale with studies of the experience of other governments, and on court opinions addressing the same topic. See *Renton, supra* at 51-52, 106 S.Ct. 925.

So, even if plaintiff were required to apply an intermediate level of scrutiny to demonstrate that its ordinance was a content-neutral time, place, and manner regulation designed to serve a substantial governmental interest while allowing for reasonable alternative avenues of communication, it would have met its burden. Plaintiff could reasonably rely on the finding adopted by the Supreme Court and by this Court that "'[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior.'" *Bellanca, supra* at 718, 101 S.Ct. 2599 quoting a legislative memorandum relied on in *Bellanca; Jott, supra* at 546, 569 N.W.2d 841.

Furthermore, Bryce Kelley, the township planner responsible for drafting the ordinance, testified in a deposition that his understanding of the experience of other communities in separating alcohol and nudity was that it created a better community. "A city's *618 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" *Alameda Books, supra* at 444, 122 S.Ct. 1728 (Kennedy, J., concurring), quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion). Kelley also testified that he compared the number of police runs to defendant's bar with the number of police runs to a strip mall containing no adult entertainment establishments and found thirty percent more police runs to defendant's business. Although Kelley testified that he did not present this information to the township board before the adoption of the ordinance, the person who was the township clerk at the time the ordinance was enacted recalled Kelley discussing the issue when the ordinance was being considered.

More importantly, Kelley testified that he sought assistance from a consulting **128 company, McKenna Associates, that prepared a report for the township board concerning several ordinance revisions, including Ordinance No. 02-16-99(2), which regulated sexually oriented businesses. The McKenna report, based on studies from a number of municipalities, summarized adverse secondary effects of sexually oriented businesses, including topless bars: These studies, taken together, provide compelling evidence that sexually oriented businesses are associated with high crime rates and depression of property values. In addition, such businesses can dramatically change the character of the community because of noise, litter, and illicit activities generated by them. [Deposition of Bryce Kelley, exhibit 2, McKenna report, p. 1]

In summary, we hold that the trial court did not err by applying rational basis scrutiny to plaintiff's ordinance*619 and finding that it was constitutionally valid and enforceable. *Jott, supra* at 545-548, 569 N.W.2d 841. Moreover, MCR 7.215(J)(1) requires this Court to follow *Jott, supra.* Under *LaRue* and its progeny, as modified by *44 Liquormart,* a state may exercise its inherent police powers and constitutionally regulate appropriate places where liquor may be sold, including prohibiting nudity at establishments with liquor licenses. "[T]he State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *44 Liquormart, supra* at 515, 116 S.Ct. 1495. Finally, even if we apply intermediate level scrutiny to plaintiff's ordinance, we still find it to be a constitutional content-neutral time, place, and manner regulation that is designed to combat adverse secondary effects of the combination of alcohol and nudity and that allows for reasonable alternative avenues of communication. *Iacobucci, supra* at 96-97, 107 S.Ct. 383; *Jott, supra* at 527, 545-546, 569 N.W.2d 841.

C. A Disputed Material Fact Issue Does Not Require A Trial

Defendant also argues that there is no evidence in the record of adverse secondary effects from defendant's business and that it presented evidence that there are no adverse secondary effects from adult entertainment in general, or from defendant's business in particular. At a minimum, defendant argues that a sufficient question of fact existed concerning such secondary effects to avoid the grant of summary disposition. We disagree.

A municipality may adopt an ordinance to address its concern regarding adverse effects it reasonably believes may occur to the community in the future. In *Jott, supra* at 528-

529, 569 N.W.2d 841, this Court rejected the claim that defendant Clinton Township had not justified its *620 zoning ordinance restricting locations of adult entertainment uses "because, at the time the ordinance was enacted, not a single adult use existed in the township and because defendant never conducted its own independent study regarding the impact of adult uses in the community." The *Jott* panel relied on *Renton, supra,* where the Supreme Court upheld the constitutionality of a zoning ordinance restricting adult motion picture theaters opining:

> "We hold that Renton was entitled to rely on the experiences of Seattle and other cities ... in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." [**129*Jott, supra* at 529, 569 N.W.2d 841, quoting *Renton, supra* at 51-52, 106 S.Ct. 925.]

In both *Renton* and *Jott* the municipality considered the experience of other cites with adult entertainment business. *Renton, supra* at 50, 106 S.Ct. 925; *Jott, supra* at 529, 569 N.W.2d 841. Further, the United States Supreme Court held that the city of Renton could rely on the "detailed findings" of adverse secondary effects of adult entertainment businesses in an appellate decision[6] addressing the type of ordinance at issue. *Renton, supra* at 51, 106 S.Ct. 925. In *Pap's, supra,*

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[6] *Northend Cinema, Inc. v. Seattle,* 90 Wash.2d 709, 585 P.2d 1153 (1978).

the plurality opinion recognized that the ordinance of the city of Erie prohibiting public nudity (effectively banning nude dancing without pasties and G-strings) was aimed at combating crime and other negative secondary effects "which we have previously recognized are 'caused by *621 the presence of even one such' establishment." *Pap's, supra* at 291, 120 S.Ct. 1382 quoting *Renton, supra* at 47-48, 50, 106 S.Ct. 925. The Court observed that "[e]ven in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing." *Pap's, supra* at 297, 120 S.Ct. 1382 citing *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 393 n. 6, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (applying "exacting scrutiny" and upholding Missouri's campaign finance legislation against First Amendment challenge). And the Court noted that *O'Brien, supra,* which applied intermediate scrutiny to federal legislation banning draft card burning, "required no evidentiary showing at all that the threatened harm was real." *Pap's, supra* at 299, 120 S.Ct. 1382. Clearly, plaintiff was not required to demonstrate that nude dancing in establishments selling alcohol caused adverse secondary effects by conducting an empirical study in the community before adopting its ordinance.

We also reject defendant's argument that an affidavit by its expert, Dr. Daniel Linz, cast sufficient doubt on studies finding adverse secondary effects from adult entertainment businesses to create an issue of material fact requiring trial. Dr. Linz opined that "there is absolutely no *properly* conducted studies or research that establish or demonstrate that exotic dance clubs which serve alcoholic beverages engender *sufficient* 'secondary effects' so as to warrant the

enactment" of plaintiff's ordinance.[7] Dr. Linz also *622 noted his work was submitted to the Supreme Court in *Pap's, supra,* in an amicus curiae brief, and that Justice O'Connor (plurality opinion) and Justice Souter (concurring and dissenting) commented on it. In that regard, Justice O'Connor wrote: "In *Nixon,* however, we flatly rejected that idea [to require an empirical study to support the city's conclusion concerning adverse secondary effects] ... (noting that the 'invocation of academic studies said to indicate' that the threatened harms are not real is insufficient to cast doubt on the experience of the local government)." *Pap's, supra* at 300, 120 S.Ct. 1382 citing and quoting *Nixon, supra* at 394, 120 S.Ct. 897. Moreover, as already discussed, this Court held in *Jott* that a rational basis exists for banning nudity from establishments licensed to sell alcohol. No further evidentiary showing by plaintiff was necessary in this case where plaintiff's ordinance and the one this Court held to be "constitutionally valid and **130 enforceable" were, in pertinent part, identical. *Jott, supra*NK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=595&FindType=Y&SerialNum=1997151740" at 548, 569 N.W.2d 841.

D. An Injunction Enforcing Plaintiff's Ordinance Is Not A "Prior Restraint"

Defendant next argues that the issuance of a permanent injunction is an unconstitutional prior restraint of expression protected by the First Amendment. We disagree.

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[7] Affidavit of Dr. Daniel Linz, ¶ 9, exhibit D, defendant's response to plaintiff's motion for summary disposition (emphasis added).

"Any system of prior restraints on expression bears a heavy presumption against its constitutional validity." *Cadillac v. Cadillac News & Video, Inc.*, 221 Mich.App. 645, 649, 562 N.W.2d 267 (1997), citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). The term "prior restraint" is used to describe an administrative or judicial order that forbids*623 certain communications in advance of the time that the communications are to occur. *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993). Temporary restraining orders and permanent injunctions, which actually forbid speech activities, are classic examples of prior restraints. *Id.* Prior restraints usually arise in efforts by the government to suppress obscenity. See, e.g., *Cadillac News & Video, supra.* In *Freedman v. Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Supreme Court held that the First Amendment required procedural safeguards to guard against suppression of protected speech when attempting to ban unprotected speech. The *Freedman* Court held unconstitutional a state system for the licensing of movies, holding "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Id.* at 58, 85 S.Ct. 734. To pass constitutional muster a prior restraint of unprotected expression must meet three conditions:

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured. [*Southeastern*

Promotions, Ltd. v. Conrad, 420 U.S. 546, 560, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), summarizing *Freedman, supra.*]

Defendant relies on YPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1980105866" *Vance v. Universal Amusement Co., Inc.,* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), to support the argument that the injunction here is a prior restraint. In *Vance,* the Supreme Court *624 held a Texas statute unconstitutional on the basis that it authorized an invalid prior restraint because it permitted enjoining the future showing of films that had not yet been found to be obscene when a movie theater had exhibited obscene films in the past. *Id.* at 316, 100 S.Ct. 1156. The Court held that the fact that a judge had issued the injunction in *Vance* did not save the statute from constitutional infirmity and that "the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, without regard to the context in which they are displayed, precludes the enforcement of these nuisance statutes against motion picture exhibitors." *Id.* at 317, 100 S.Ct. 1156.

Although being "'in a state of nudity' is not an inherently expressive condition," *Pap's, supra* at 289, 120 S.Ct. 1382 nonobscene nude dancing may be a form of expression falling within the outer limits of protection by the First Amendment, *Jott, supra* at 526, 569 N.W.2d 841, citing *Barnes, supra* at 565-566, 111 S.Ct. 2456. **131 On the other hand, the First Amendment does not protect nude dancing involving lewd, sexual activity. *Michigan ex rel Wayne Co. Prosecutor v. Dizzy Duck,* 449 Mich. 353, 360-361, 365, 535 N.W.2d 178 (1995). So a censor's effort to ban nude dancing

because it is obscene may experience difficulties in separating nonobscene expressive conduct from obscene nude dancing. Defendant's argument fails because neither plaintiff's ordinance nor the injunction at issue here totally bans nude dancing on the basis that it is obscene; the ordinance and the order to comply with the ordinance only prohibit nude dancing at a place where liquor is sold. *Jott, supra* at 538, 569 N.W.2d 841. The "'critical fact is that [the ordinance and the injunction enforcing it] has not forbidden *625 [nude dancing] across the board.'" *Id.*, quoting *LaRue, supra* at 118, 93 S.Ct. 390.

In *Danish News Co. v. Ann Arbor,* 517 F.Supp. 86 (E.D.Mich., 1981), affirmed without opinion 751 F.2d 384 (C.A.6, 1984), Judge Patricia A. Boyle, then a United States District Court judge, and later a Michigan Supreme Court Justice, declined to entertain the plaintiff's constitutional challenge to a zoning ordinance of the city of Ann Arbor restricting locations of "adult entertainment business." Finding the zoning ordinance constitutional, the state trial court granted Ann Arbor a preliminary injunction because the plaintiff's business, an adult bookstore, was a nonconforming use that constituted a nuisance per se. *Id.* at 88. This Court and our Supreme Court denied the plaintiff's application for leave to appeal. *Id.* Like defendant, the plaintiff in that case argued that *Freedman, supra,* together with *Vance, supra,* "require the conclusion that where a nuisance per se statute is applied to first amendment activity an injunctive order in accordance with the statute is a prior restraint." *Danish News, supra* at 92. But Judge Boyle found that enjoining a violation of Ann Arbor's zoning ordinance was materially distinguishable from enjoining the future showing of films under the nuisance statute in *Vance,* which was aimed at obscenity, because the statute in *Vance* "presented the usual problem of discerning the fine line between obscenity which

is not protected by the first amendment [sic] and ... material which does not meet the definition of obscenity and, therefore, enjoys first amendment protection." *Danish News, supra* at 93. In contrast, a zoning ordinance "does not purport to forbid display or sale of obscenity but rather defines a particular *626 type of business which may admittedly have first amendment protection and simply regulates the location of the business." *Id.* Thus, Judge Boyle opined:

> Because the zoning ordinance does not rely on the fine line between obscenity and protected first amendment material, certain of the reasons for the strict safeguards of *Freedman* evaporate. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59, 95 S.Ct. 1239, 1246-47, 43 L.Ed.2d 448. The question is rather one of applying the plain terms of the constitutional ordinance to the situation at hand to determine whether the activity of the alleged violator is covered by the zoning ordinance. [*Danish News, supra* at 93.]

Thus, the instant case is not one where procedural safeguards are invoked because it is not necessary to draw the fine line between obscene and nonobscene nude dancing. The plain terms of plaintiff's constitutional ordinance are simply applied to the undisputed facts, i.e., that defendant provided nude dancing at its establishment licensed to sell alcohol. Enforcement of plaintiff's content-neutral, constitutional ordinance is simply not a prior restraint. In *Benton Co. v. Kismet Investors, Inc.*, 653 N.W.2d 193 (Minn.App., 2002), the **132 court affirmed the lower court's finding that the defendant's business offering nude dancing violated the county's zoning ordinance, and therefore, affirmed the issuance of a permanent injunction. The ordinance had

previously been held to be a constitutionally valid time, place, and manner regulation. *Id.* at 194, 198, citing *Kismet Investors, Inc. v. Benton Co.*, 617 N.W.2d 85, 93-95 (Minn.App., 2000). See, also, *Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001) (upholding the constitutionality of a village ordinance banning totally nude dancing and affirming *627 the issuance of a permanent injunction enforcing the ordinance), and *Colorado v. 2896 West 64th Avenue*, 989 P.2d 235 (Colo.App., 1999) (upholding issuance of a permanent injunction prohibiting nude entertainment as a nuisance contrary to a local ordinance, previously found constitutional, that regulated places where nude entertainment could be provided). Accordingly, we hold that the issuance of an injunction to enforce Van Buren Township's constitutionally valid ordinance does not violate the First Amendment as a prior restraint without procedural safeguards.

E. The Overbreadth Doctrine

Defendant argues that the township's prohibition of nudity in establishments that serve alcohol is unconstitutionally overbroad because it bans even plunging necklines and thongs and "legitimate" nude or seminude theatrical performances (*Hair*, *Oh! Calcutta*, *Salome*, and *Dance*). Also, defendant notes that the ordinance does not distinguish between male or female nudity and argues that the ordinance even extends to exposure of body parts in the restroom of any bar in the township. Defendant contends that a ban on nudity must be no greater than necessary to address harmful secondary effects and that restrictions beyond "pasties and G-strings" limit the erotic message of dancers, rendering the ordinance overbroad. We disagree.

We review de novo whether a statute or ordinance is unconstitutional under the doctrines of vagueness or overbreadth. *Boomer, supra* at 538, 655 N.W.2d 255; *People v. Rogers,* 249 Mich.App. 77, 94, 641 N.W.2d 595 (2001). We hold that plaintiff's ordinance is not unconstitutionally overbroad because there is no real and substantial*628 possibility that it will deter others not before the Court from engaging in protected expressive conduct-nude dancing at establishments not licensed to sell liquor. *Id.* at 96, 641 N.W.2d 595.

The constitutional doctrines of vagueness and overbreadth both curb arbitrary and discriminatory enforcement but are nonetheless distinct. *Plymouth Charter Twp. v. Hancock,* 236 Mich.App. 197, 199-200, 600 N.W.2d 380 (1999). The doctrines are often considered together because they are closely related, especially where claims of First Amendment violations are raised. *Id.* at 200, 600 N.W.2d 380, citing *Grayned v. Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (a vague statute may deter protected speech). There are three grounds on which a statute may be held to be void because it is vague or overbroad. *Burns v. Detroit (On Remand),* 253 Mich.App. 608, 625, 660 N.W.2d 85 (2002), mod 468 Mich. 881, 661 N.W.2d 231 (2003). A statute may be void for vagueness where: "(1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; and (3) its coverage is overly broad and impinges on First Amendment freedoms." *People v. Morey,* 230 Mich.App. 152, 163, 583 N.W.2d 907 (1998), aff'd 461 Mich. 325, 603 N.W.2d 250 (1999).

**133 A facial challenge to an ordinance on the ground that it is overbroad rests on the "prediction that third parties

will refrain from protected expression because of the [ordinance]." *In re Chmura,* 461 Mich. 517, 530, 608 N.W.2d 31 (2000). But "'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially *629 challenged on overbreadth grounds.'" *Id.* at 531, 608 N.W.2d 31, quoting *Los Angeles City Council v. Taxpayers for Vincent,* 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Moreover, particularly where expressive conduct, and not mere speech, is involved, "'the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). See, also, *Burns, supra* at 626-627, 660 N.W.2d 85, and *Morey, supra* at 164, 603 N.W.2d 250. But the "'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *Rogers, supra* at 96, 641 N.W.2d 595, quoting *Taxpayers for Vincent, supra* at 800, 104 S.Ct. 2118.

In analyzing defendant's overbreadth challenge, we note that nudity is not protected expressive conduct, it is erotic nude dancing that is expressive conduct at the outer edges of the protection afforded by the First Amendment. *Pap's, supra* at 289, 120 S.Ct. 1382. Also, unlike the defendant city's public decency ordinance in *Triplett Grille, Inc. v. Akron,* 40 F.3d 129 (C.A.6, 1994), on which defendant relies, plaintiff's ordinance does not ban nudity in all public places. The ban is limited to establishments that serve alcohol, *Jott, supra* at 540, 569 N.W.2d 841. That the ordinance broadly covers both male and female nudity does not imply an infirmity but, rather, reinforces the content-

neutral aim of the ordinance to "eradicate the effects of 'undesirable behavior' stemming from a combination of alcohol and nudity." *Jott, supra* at 545-546, 569 N.W.2d 841. The "comprehensiveness of the statute is a virtue, not a vice, because it is evidence *630 against there being a discriminatory governmental motive." *Hill, supra* at 731, 120 S.Ct. 2480. And tavern patrons using restroom facilities are generally not engaged in expressive conduct. The plain and legitimate sweep of the ordinance is to regulate trafficking in liquor by applying a prophylactic rule banning sexually explicit entertainment at licensed bars, cabarets, or taverns. *Jott, supra* at 540, 569 N.W.2d 841, citing *Felix v. Young,* 536 F.2d 1126, 1132 (C.A.6, 1976). The ordinance simply does not present a real and substantial danger of sweeping within its ambit the presentation of theatrical productions that involve nudity; nor do the other hypothetical situations defendant imagines present a real and substantial danger of chilling protected speech. Accordingly, plaintiff's ordinance is not constitutionally overbroad. *Hill, supra* at 722-723, 120 S.Ct. 2480; *Rogers, supra* at 96, 641 N.W.2d 595.

Our conclusion is further supported by the presumption of constitutional validity, *Burns, supra* at 627-628, 660 N.W.2d 85, and by the binding precedent of *Jott, supra.* Plaintiff's ordinance is identical to the ordinance held constitutional in *Jott* after this Court severed parts of the ordinance not reasonably related to the legitimate governmental interest involved. *Id.* at 548, 569 N.W.2d 841. Although *Jott* did not extensively analyze the overbreadth issue, it reversed the trial court's determination that Clinton Township's ordinance was constitutionally overbroad. **134*Jott, supra* at 537, 548, 569 N.W.2d 841. Under MCR 7.215(J)(1), the *Jott* Court's rejection of an overbreadth challenge binds this Court.

F. The Vagueness Doctrine

Defendant also argues that plaintiff's ordinance is unconstitutionally vague because a person of ordinary *631 intelligence cannot know what is prohibited, and no guidelines are provided to law enforcement. We again disagree.

"An ordinance is unconstitutionally vague if it (1) does not provide fair notice of the type of conduct prohibited or (2) encourages subjective and discriminatory application by delegating to those empowered to enforce the ordinance the unfettered discretion to determine whether the ordinance has been violated." *Hancock, supra* at 200, 600 N.W.2d 380. When a statute or ordinance is challenged on the ground that it is unconstitutionally vague, a court must review the entire text of the law, giving its words their plain ordinary meanings. *Rogers, supra* at 94, 641 N.W.2d 595; *Morey, supra* at 163, 583 N.W.2d 907. An ordinance is not vague if "'it is clear what the ordinance as a whole prohibits.'" *Hill, supra* at 733, 120 S.Ct. 2480 quoting *Grayned, supra* at 110, 92 S.Ct. 2294. An ordinance provides fair notice when persons of ordinary intelligence have a reasonable opportunity to know what is prohibited. *People v. Noble,* 238 Mich.App. 647, 652, 608 N.W.2d 123 (1999). Thus, an ordinance "is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id.*

The plain meaning of the words of the ordinance makes clear to persons of ordinary intelligence that it prohibits "nudity" in "any establishment licensed or subject to licensing by the Michigan Liquor Control Commission." Subsection 6-69(1), Van Buren Charter Township Code of Ordinances. See also *Jott, supra* at 536, 569 N.W.2d 841. Contrary to

defendant's argument, a person of ordinary intelligence is not required to guess at the meaning of "nudity." And what the ordinance as a *632 whole prohibits is easily understood by persons of ordinary intelligence. Laws written in words cannot achieve the precision of a mathematical formula. *Hill, supra* at 733, 120 S.Ct. 2480; *Grayned, supra* at 110, 92 S.Ct. 2294. But it is clear that the ordinance as a whole prohibits nudity at establishments licensed to sell alcohol. Finally, because the ordinance is not vague, it does not confer unfettered discretion to those empowered to enforce the ordinance to determine whether it has been violated. *Owosso, supra* at 217, 657 N.W.2d 538; *Hancock, supra* at 200, 600 N.W.2d 380.

G. Due Process

Defendant raises one other constitutional issue in the course of arguing that state law preempts plaintiff's ordinance: that its liquor license, together with entertainment and topless entertainment permits, constitute a property interest that cannot be taken without due process of law. Defendant waived this issue because it was not included in defendant's statement of questions on appeal. MCR 7.212(C)(5); *Persinger v. Holst,* 248 Mich.App. 499, 507 n. 2, 639 N.W.2d 594 (2001). Nevertheless, this Court may consider an issue raised in a nonconforming brief if it is one of law and the record is factually sufficient. *McKelvie v. Auto Club Ins. Ass'n,* 203 Mich.App. 331, 337, 512 N.W.2d 74 (1994). We briefly address this issue, and conclude it has no merit. *See, e.g., Joerger v. Gordon Food Service, Inc.,* 224 Mich.App. 167, 172, 568 N.W.2d 365 (1997).

**135 Defendant's argument relies on *Bundo, supra,* which held a holder of a liquor license "has a 'property' interest in the renewal of his liquor license such that before he

may be deprived of this interest he must be afforded rudimentary due process." *633*Bundo, supra* at 704, 238 N.W.2d 154. Reliance on *Bundo* is misplaced. No denial, nonrenewal, or revocation of a liquor license was involved in this case. Instead, Van Buren Township enacted an ordinance pursuant to its broad police powers to protect the health, safety, and welfare of the public. While no person may be deprived of life, liberty, or property without due process of law, U.S. Const., Am. V; Const. 1963, art. 1, § 17; *Tolksdorf v. Griffith,* 464 Mich. 1, 7, 626 N.W.2d 163 (2001), no one has a vested right to the continuation of an existing law by precluding the amendment or repeal of the law, *Rookledge v. Garwood,* 340 Mich. 444, 457, 65 N.W.2d 785 (1954). A vested right is "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Detroit v. Walker,* 445 Mich. 682, 699, 520 N.W.2d 135 (1994). But an interest "'cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws.'" *Id.*, quoting *Minty v. Bd. of State Auditors,* 336 Mich. 370, 390, 58 N.W.2d 106 (1953). That is the case here; consequently, defendant's argument fails on the merits.

V. Conclusion

The trial court did not abuse its discretion in finding no basis for judicial disqualification. We also hold that under the totality of the circumstances, due process did not require judicial disqualification. We conclude that state law does not preempt Van Buren Township's ordinance. Finally, we hold that Van Buren Township's ordinance is constitutional and enforceable. Accordingly, we affirm the trial court's *634 grant of summary dispositioApril 6, 2007n and the issuance of a permanent injunction enforcing the ordinance.